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# Protecting against Plunder

## The United States and the International Efforts against Looting of Antiquities

Asif Efrat\*

**Word Count: 21,297**

**Abstract.** In 1970 UNESCO adopted a convention intended to stem the flow of looted antiquities from developing countries to collections in art-importing countries. The majority of art-importing countries, including Britain, Germany, and Japan, refused to join the Convention. Contrary to other art-importing countries, and reversing its own traditionally-liberal policy, the United States accepted the international regulation of antiquities and joined the UNESCO Convention. The article seeks to explain why the United States chose to establish controls on antiquities, to the benefit of foreign countries facing archaeological plunder and to the detriment of the US art market. I argue that the concern of US policymakers about looting abroad resulted from a series of scandals which exposed the involvement of American museums and collectors with looted material. Advocacy efforts of American archaeologists also played a key role in educating policymakers about the loss of historical knowledge caused by looting and the necessity of regulation. The article further analyzes how antiquities dealers and certain museums lobbied Congress against implementing the UNESCO Convention and why Congress decided in favor of implementation as an act of international moral leadership. Following the analysis of the Congressional battle, I examine how the US debate over looted antiquities has evolved to the present. The article concludes with implications for the role of values versus interests in international law.

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## I. INTRODUCTION

The international trade in antiquities, many of which have been illegally excavated and illegally exported, results in the destruction of the world's archaeological heritage.<sup>1</sup> As part of this ongoing trade, archaeological sites and monuments all over the world are plundered, and the loot comes to rest in museums and private collections primarily in Europe and North America, and increasingly in East Asia.<sup>2</sup> While some maintain that the problem of antiquities looting "has grown out of all control" in recent years<sup>3</sup>, the problem itself is far from new and so are the international efforts to address it. At the center of these efforts has been a 1970 UNESCO convention intended to stem the flow of looted antiquities<sup>4</sup> from poor archaeologically-rich countries to rich market countries: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereafter the UNESCO Convention or the Convention). While this Convention was embraced by developing countries facing archaeological plunder, the majority of market countries – including Britain, Germany, and Japan – rejected the Convention. From their point of view, the Convention harmed the

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<sup>1</sup> Neil Brodie and Jenny Doole, *Illicit Antiquities*, in *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE* 1, 1 (Neil Brodie, Jennifer Doole, & Colin Renfrew eds., 2001).

<sup>2</sup> Neil Brodie, *An Archaeologist's view of the Trade in Unprovenanced Antiquities*, in *ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE* 52, 52 (Barbara Hoffman ed., 2006).

<sup>3</sup> Neil Brodie, *Introduction*, in *ILLICIT ANTIQUITIES: THE THEFT OF CULTURE AND THE EXTINCTION OF ARCHAEOLOGY* 1, 1 (Neil Brodie & Kathryn Walker Tubb eds., 2002). See Brodie, *supra* note 2, at 52: "The trade in unprovenanced antiquities has exploded over the past 40 years as barriers to communication have fallen and technology has improved".

<sup>4</sup> A term commonly used in the debate over antiquities is "illicit antiquities". The term "illicit antiquities" was coined by archaeologists to highlight the fact that the trade consists largely of antiquities which have been illegally excavated and/or illegally exported from source countries, where archaeological heritage is typically in public ownership. The antiquities are "illicit" inasmuch as their original removal and export were illegal; yet later on they change hands in a process that erases their illegal origin and allows them to be bought legally by museums and private collectors. Brodie, *supra* note 3, at 2. Since the antiquities ultimately obtain legality, I use the term "looted antiquities", rather than "illicit antiquities".

interests of art dealers, museums and collectors by limiting their ability to acquire antiquities. Furthermore, market countries saw the Convention as unfairly imposing costs on their law enforcement agencies and bureaucracies to the benefit of foreign countries. Yet the United States, the largest market country, took a different approach. Contrary to other market countries, and reversing its own traditionally-liberal policy, the United States accepted the international regulation of antiquities as established by the UNESCO Convention. Soon after the Convention's adoption, the United States began the process of its ratification and implementation. This article seeks to explain the following puzzle: Why did the United States choose to join the international efforts against looting and establish controls on antiquities, to the benefit of foreign countries facing archaeological plunder and to the detriment of the US art market?

While this puzzle is intriguing in its own right, it also constitutes a good case-study for one of the fundamental debates in international law scholarship: the relative role of values and interests in the international legal system. Proponents of the interest-based approach understand states' motivations with respect to international law in instrumental and rationalist terms. For example, according to Goldsmith and Posner, "states act rationally to maximize their interests", defined as "preferences about outcomes".<sup>5</sup> In their theory, states sign international agreements to achieve joint gains.<sup>6</sup> Guzman's theory of international law rests on similar rationalist assumptions. In his view, "states will only enter into agreements when doing so makes them (or, at least, their policy-makers) better off."<sup>7</sup> The attitudes of most countries toward the 1970 UNESCO Convention are consistent with this interest-based view. The Convention aimed to make archaeologically-rich countries (hereafter source countries) better off by helping them to

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<sup>5</sup> JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 6-7 (1995).

<sup>6</sup> *Id.* at 84-85.

<sup>7</sup> ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS* 121 (2008).

curb the looting and outflow of their antiquities. These countries indeed have been the Convention's most ardent supporters from its inception. By contrast, the Convention did not offer any gains to market countries and, in fact, threatened to make them worse off by restricting their import of antiquities and by imposing law enforcement and administrative costs. Most market countries thus judged the Convention to be adverse to their interests and refused to join it. One would be hard-pressed, however, to explain the American choice to join the UNESCO Convention in self-interested terms. The United States is not archaeologically-rich, and looting of American archaeology has never been a major concern. Rather, the US goal in supporting and implementing the UNESCO Convention was to *help foreign countries protect their archaeological heritage*. An interest-based rationalist approach will find it difficult to account for the willingness of the United States to put curbs on its own art market in order to tackle the plunder of antiquities abroad.

The competing view in the values-versus-interests debate attributes an important role to values in the international legal system. Indeed, proponents of the value-based view do not deny that interests and "politics" play an important role in shaping states' attitudes toward international law. They acknowledge that international law "is made by political actors, through political procedures, for political ends"<sup>8</sup> and that treaties are based on "well-developed conceptions of national interest."<sup>9</sup> Yet they also maintain that international law is a means to further values that transcend self-interest, like the welfare of individual human beings and the common good of mankind.<sup>10</sup> In their view, international law "does and should reflect and

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<sup>8</sup> LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 4 (1995).

<sup>9</sup> Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 183 (1993).

<sup>10</sup> HENKIN, *supra* note 8, at 4-5, 97, 168, 279.

promote values – the highest moral beliefs of international society.”<sup>11</sup> While this value-based view of international law is seemingly consistent with the American support for the UNESCO Convention, the two are not easily reconciled. The Convention has clearly sought to promote values, those of protection of archaeological heritage and preservation of historical knowledge. Why, then, was the United States the only major market country who cared enough about those values to support the Convention upon its adoption? Why did other market countries favor their self-interest in free movement of antiquities over the values promoted by international regulation of antiquities?

The article answers these questions by examining the evolution of the American policy on international antiquities regulation from the late 1960s to the present. My analysis closely examines the revolutionary period in US policy (late 1960s to early 1980s), in which the traditionally-liberal approach to the antiquities trade gave way to the acceptance of regulation. I argue that the concern of US policymakers about looting abroad resulted from a series of scandals in the early 1970s which exposed the involvement of American museums and collectors with looted material. These scandals convinced policymakers that the United States ought to put its own house in order. Advocacy efforts of the American archaeological community also played a key role in generating concern about the *negative externalities*<sup>12</sup> of the antiquities trade in foreign countries. Using their knowledge and expertise, the archaeologists educated policymakers about the destruction and loss of historical knowledge caused by looting and the necessity of regulation. The article further examines how antiquities dealers and certain

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<sup>11</sup> Jonathan Charney, Donald Anton & Mary Ellen O’Connell, *Politics, Values and Functions: International Law in the 21<sup>st</sup> Century*, in *POLITICS, VALUES AND FUNCTIONS: INTERNATIONAL LAW IN THE 21<sup>ST</sup> CENTURY* 1, 2 (Jonathan Charney, Donald Anton & Mary Ellen O’Connell eds., 1997).

<sup>12</sup> Asif Efrat, *A Theory of Internationally Regulated Goods*, *FORDHAM INT’L L. J.* (forthcoming 2009).

museums lobbied Congress against implementing the UNESCO Convention and why Congress decided in favor of implementation as an act of international moral leadership.

Beyond its contribution to the values-versus-interests literature, the article also speaks directly to the contemporary debate over the antiquities trade and its regulation. The debate between the pro-regulation archaeologists and the anti-regulation art community has been raging since the late 1960s; it is still as contentious, polarized and emotional today as it was four decades ago.<sup>13</sup> The legal literature addressing the debate is largely normative, offering arguments for and against regulation of antiquities as a means to curb archaeological plunder; the same arguments have persisted since the early days of the debate.<sup>14</sup> This article seeks to advance the literature by offering the first political economy analysis of the issue. It traces the policy goals of each of the contending parties; examines their lobbying methods and efforts to shape US policy; and identifies the concerns and considerations guiding policymakers. Understanding the political dynamic of antiquities regulation may allow the circular debate over antiquities to move forward.

The article is organized as follows. Part II provides an introduction to the trade in looted antiquities and an overview of the causes of looting. Part III examines the 1970 UNESCO Convention and its rejection by most market countries. Part IV shifts the focus to the United States and analyzes the debate over the implementation of the UNESCO Convention, which culminated in the 1983 enactment of the Convention on Cultural Property Implementation Act (CPIA). Part V examines how the US debate over looted antiquities has evolved from 1983 to the present. Part VI concludes.

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<sup>13</sup> Alexander Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 *FORDHAM INT'L L. J.* 690 (2008).

<sup>14</sup> See, for example, PAUL BATOR, *THE INTERNATIONAL TRADE IN ART* (1983); John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 *AM. J. INT'L L.* 831 (1986); Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 *CHI. J. INT'L L.* 169 (2007).

## II. THE TRADE IN LOOTED ANTIQUITES: BACKGROUND

Why regulate the antiquities trade through an international convention? The motivation for international regulation of antiquities is the *negative externalities* generated by uncontrolled trade in these objects. More specifically, the source of the problem is the looting process that feeds the trade. Archaeologists identify three negative externalities that result from the looting of antiquities. First, and most obviously, looting of antiquities results in archaeological destruction. The clandestine excavation and removal of the objects causes enormous and irreparable damage to the looted sites and monuments. At times, the destruction caused by the looting itself is accompanied by purposeful destruction intended to eliminate evidence.<sup>15</sup> The antiquities themselves are often damaged as well due to the inexperienced excavation and lack of proper conservation.<sup>16</sup> Also discarded and destroyed in the process are mundane objects or fragmentary pieces which do not command high market value yet may carry archaeological value.

Second, looting of antiquities results in the loss of historical information and knowledge. To grasp the magnitude of the loss, one needs to understand the centrality of *context* to archaeological research. Context, considered by some as the “essence of archaeology”,<sup>17</sup> is “where an artefact is found and what is found with it ... the set of relationships among artefacts

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<sup>15</sup> Colin Renfrew, *Foreword*, in *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE*, xi (Neil Brodie, Jennifer Doole, & Colin Renfrew eds., 2001); NEIL BRODIE, JENNY DOOLE & PETER WATSON, *STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL* 12 (2000); PENILLE ASKERUD & ETIENNE CLÉMENT, *PREVENTING THE ILLICIT TRAFFIC IN CULTURAL PROPERTY: A RESOURCE HANDBOOK FOR THE IMPLEMENTATION OF THE 1970 UNESCO CONVENTION* 10 (1997).

<sup>16</sup> Lyndel Prott, *National and International Laws on the Protection of Cultural Heritage*, in *ANTIQUITIES: TRADE OR BETRAYED: LEGAL, ETHICAL AND CONSERVATION ISSUES* 57, 57 (Kathryn Walker Tubb ed., 1995).

<sup>17</sup> Kathryn Walker Tubb & Neil Brodie, *From Museum to Mantelpiece: The Antiquities Trade in the United Kingdom*, in *DESTRUCTION AND CONSERVATION OF CULTURAL PROPERTY* 102, 105 (Robert Layton, Peter Stone & Julian Thomas eds., 2001).



and between artefacts and their surrounding structures.”<sup>18</sup> Archaeologists maintain that coherent historical information “comes about only through the systematic study of **context**.”<sup>19</sup> Objects, in their context of discovery, can shed light on past cultures. In fact, objects which seem unimportant by themselves may acquire great significance if found next to other objects or far removed from their usual area of distribution.<sup>20</sup> Yet the illegal excavation and removal of antiquities destroys their context with the resulting loss of historical information.<sup>21</sup> Indeed, archaeologists maintain that antiquities wrenched out of their context of discovery add very little to the knowledge of the past.<sup>22</sup> Looted antiquities may be beautiful objects that please the collector and the museum visitor. From the archaeologist’s viewpoint, however, they are worthless.<sup>23</sup>

The third negative externality of the trade in looted antiquities is borne by the communities from whom the antiquities have been looted. Archaeological remains are part of a people’s culture and tradition; the illegal removal of those remains and the accompanying destruction eliminate a part of the people’s history and heritage and at times damage sites and monuments that are sacred.<sup>24</sup> Moreover, looting deprives the community from a possibly lucrative economic resource. Had the antiquities been on display at the archaeological site or a nearby museum, they would have attracted tourism and could have generated profits for the local economy.<sup>25</sup>

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<sup>18</sup> Brodie, *supra* note 2, at 52.

<sup>19</sup> COLIN RENFREW, LOOT LEGITIMACY AND OWNERSHIP: THE ETHICAL CRISIS IN ARCHAEOLOGY 10 (1999). Emphasis in original.

<sup>20</sup> BRODIE, DOOLE & WATSON, *supra* note 15, at 10-11.

<sup>21</sup> Brodie, *supra* note 2, at 52.

<sup>22</sup> RENFREW, *supra* note 19, at 10; Prott, *supra* note 16, at 57.

<sup>23</sup> BRODIE, DOOLE & WATSON, *supra* note 15, at 11. See Tubb and Brodie, *supra* note 17, at 105: “Artefacts divested of contextual information are pitifully dispossessed, impoverished of meaning and, as such, are an anathema.”

<sup>24</sup> BRODIE, DOOLE & WATSON, *supra* note 15, at 12-13.

<sup>25</sup> BRODIE, DOOLE & WATSON, *supra* note 15, at 14; Brodie, *supra* note 3, at 13-15.

While the looting itself takes places primarily in poor archaeologically-rich countries, archaeologists identify the *demand of market countries* as the culprit. Demand from museums and collectors, archaeologists maintain, fuels the looting. This begs a critical question: How can looted objects obtain legitimacy and end up as museum exhibits or collector items? The answer, according to archaeologists, is that most antiquities, 60%-90% according to estimates, “surface” on the market and are sold without *provenance*, that is, they have no accompanying information as to where they have been found and in what circumstances; nor do they have information about their previous ownership history.<sup>26</sup> Obviously, without such critical information it is virtually impossible to investigate the pedigree of a particular object and prove that it has been looted. *Nevertheless, archaeologists hold the view that an antiquity without provenance is most likely looted.*<sup>27</sup> In the strong words of Tubb and Brodie, “[t]here can be little doubt that the majority of antiquities without demonstrable provenance ... have been looted from archaeological sites ... . They are illicit and it is foolish to pretend otherwise.”<sup>28</sup> Archaeologists further charge that looted antiquities are effectively laundered as they pass through the trading network so they can be offered for sale legally in a reputable outlet and be purchased by a respectable consumer. Since the antiquities market has traditionally not required revealing a record of ownership history or original findspot of an object; and, furthermore, given the principle of vendor anonymity<sup>29</sup>;

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<sup>26</sup> BRODIE, DOOLE & WATSON, *supra* note 15, at 26; Brodie, *supra* note 2, at 52-53.

<sup>27</sup> Brodie, *supra* note 2, at 52-53; Neil Brodie and Colin Renfrew, *Looting and the World's Archaeological Heritage: The Inadequate Response*, 34 ANN. REV. ANTHROPOLOGY 343, 343-344 (2005).

<sup>28</sup> Tubb and Brodie, *supra* note 17, at 106.

<sup>29</sup> *Id.*, at 110; As Bator writes, “[t]he most striking thing to a lawyer who comes upon the art world is how deep and uncritical is the assumption that transactions within it should normally be ... secret. No dealer or auction house will normally reveal the provenance of an object offered for sale; it is assumed that buyers and the public have no business knowing where and when and for how much the object was acquired. ... Indeed the tradition is such that information is rarely ever sought.” Quoted in Morag Kersel, *From the Ground to the Buyer: A Market Analysis of the*

looted antiquities may obtain a veneer of legitimacy when they are sold by dealers and auction houses. Illegally excavated and exported, antiquities often change hands several times before being purchased by institutional or private collectors, and any details of their illegal origin are erased or lost in the process. Once published in a sales catalogue, an exhibition catalogue, or an academic paper, the antiquities acquire a new and respectable pedigree and are effectively laundered. In the absence of provenance information and transparency, it is extremely difficult to recognize any particular object as looted or demonstrate a consistent link between rampant looting and the appearance of antiquities on the market.<sup>30</sup>

Trade practitioners vehemently dispute these charges of archaeologists. First and foremost, they repudiate the concept of ‘guilty until proved innocent’ – the assumption that unprovenanced antiquities are looted – and maintain that “thousands of items have lost their provenance for perfectly good reasons.”<sup>31</sup> Some antiquities came on the market many years ago, and their provenance has been lost over time. War, migration, and sheer indifference have taken their toll as well.<sup>32</sup> Another argument is that many objects are the product of chance finds, rather than looting, and were discovered in the course of construction projects or agricultural operations.<sup>33</sup>

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*Trade in Illegal Antiquities*, in *ARCHAEOLOGY, CULTURAL HERITAGE AND THE ANTIQUITIES TRADE* 188, 194 (Neil Brodie, Morag Kersel, Christina Luke, and Kathryn Tubb eds., 2006).

<sup>30</sup> BRODIE, DOOLE & WATSON, *supra* note 15, at 29; Brodie, *supra* note 3, at 2; Brodie and Renfrew, *supra* note 27, at 353.

<sup>31</sup> James Ede, *The Antiquities Trade: Towards a More Balanced View*, in *ANTIQUITIES: TRADE OR BETRAYED: LEGAL, ETHICAL AND CONSERVATION ISSUES* 211, 211 (Kathryn Walker Tubb ed., 1995).

<sup>32</sup> James Ede, *Ethics, the Antiquities Trade, and Archaeology*, 7 *INT’L J. CULTURAL PROP.* 128 (1998).

<sup>33</sup> SIMON R. M. MACKENZIE, *GOING, GOING, GONE: REGULATING THE MARKET IN ILLICIT ANTIQUITIES* 52-55 (2005). Archaeologists consider this argument highly implausible. Tubb and Brodie, *supra* note 17, at 106.

Auction houses and antiquities dealers have traditionally argued that the bulk of unprovenanced antiquities have come from small private collections or were discovered in attics.<sup>34</sup>

Archaeologists attribute to dealers a key role in the process of looting and laundering antiquities; yet they believe that the ultimate responsibility for the plunder of archaeology lies with the end-consumers, whose appetite for antiquities drives the market and fuels the looting that supplies it. Indiscriminate acquisition of unprovenanced antiquities by museums and private collectors is, in the archaeologists' view, the root of the looting problem.<sup>35</sup> As Brodie and Doole argue, "[t]he trade exists, after all, to create and satisfy a demand: collectors are its *sine qua non*."<sup>36</sup> The high value that antiquities command at the end of the chain and the high profits made by selling them constitute a powerful incentive for ongoing looting back at the beginning of the chain.<sup>37</sup> According to the archaeologists, private collectors and museums who purchase unprovenanced objects "are subscribing to the looting process by providing funds, which both reward the looters and underwrite their further depredations."<sup>38</sup> Indeed, not all museums engage in indiscriminate acquisition which breeds archaeological looting. Since 1970 many museums have adopted ethical acquisition policies and have avoided acquiring antiquities whose legitimate

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<sup>34</sup> BRODIE, DOOLE & WATSON, *supra* note 15, at 26. See also Brodie, *supra* note 2, at 53. Various arguments have been offered in justification of the secrecy shrouding the trade. Some maintain that non-disclosure of sources is a commercial necessity which allows dealers to maintain competitiveness and protects their profit margins. Others consider anonymity essential for the protection of sellers (for example, owners wishing to hide the sale from their families or trying to avoid the attention of thieves). MACKENZIE, *supra* note 33, 47-49; Brodie, *supra* note 2, at 53; Brodie and Renfrew, *supra* note 27, at 347.

<sup>35</sup> Brodie and Renfrew, *supra* note 27, at 349.

<sup>36</sup> Brodie and Doole, *supra* note 1, at 2.

<sup>37</sup> Brodie and Renfrew, *supra* note 27, at 348.

<sup>38</sup> RENFREW, *supra* note 19, at 7. See also Brodie and Renfrew, *supra* note 27, at 349: "By rewarding the looters through the acquisition of "unprovenanced" material, museums are directly subscribing to the ongoing process of clandestine excavation... ."

origin and history could not be established.<sup>39</sup> Nevertheless, archaeologists maintain that some museums still lack clear and transparent ethical acquisition policies and continue to obtain material without provenance, thereby encouraging and supporting looting.<sup>40</sup> More specifically, archaeologists consider art museums in the United States to be the main culprits in creating demand for looted antiquities.<sup>41</sup> The number of American art museums collecting archaeological material has been increasing steadily throughout the Twentieth century, and so has the size of their collections. The rising demand of museums for antiquities has met in recent decades with diminishing supply of legitimate objects, as more and more countries took measures to secure their archaeological heritage and prevent its flow abroad. As a result, museums seeking to enlarge their collections have had to acquire unprovenanced antiquities.<sup>42</sup> Indeed, museums have often received unprovenanced antiquities from collectors as gifts or bequests.<sup>43</sup> Yet archaeologists still consider museums as the bearers of ultimate responsibility to the unethical standards of indiscriminate acquisition prevailing in the market and to the looting that is their

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<sup>39</sup> Brodie, *supra* note 2, at 54; Brodie and Renfrew, *supra* note 27, at 350; BRODIE, DOOLE & WATSON, *supra* note 15, at 43-46; Robert Hallman, *Museums and Cultural Property: A Retreat from the Internationalist Approach*, 12 INT'L J. CULTURAL PROP. 201 (2005).

<sup>40</sup> Brodie, *supra* note 2, at 54; Brodie and Renfrew, *supra* note 27, at 345.

<sup>41</sup> Neil Brodie, *Introduction*, in ARCHAEOLOGY, CULTURAL HERITAGE AND THE ANTIQUITIES TRADE 1, 10 (Neil Brodie, Morag Kersel, Christina Luke, and Kathryn Tubb eds., 2006); Colin Renfrew, *Museum Acquisitions: Responsibility for the Illicit Traffic in Antiquities*, in ARCHAEOLOGY, CULTURAL HERITAGE AND THE ANTIQUITIES TRADE 245, 246 (Neil Brodie, Morag Kersel, Christina Luke, and Kathryn Tubb eds., 2006).

<sup>42</sup> Brodie, *supra* note 41, at 11; Brodie, *supra* note 2, at 55; Arielle Kozloff, *The Antiquities Market: When, What, Where, Who, Why ... and How Much?*, in WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 183, 185 (Kate Fitz Gibbon ed., 2005) ["There was a tremendous expansion in antiquities purchases between 1950 and 1995, especially among the younger museums, which needed to build collections."]

<sup>43</sup> Brodie and Renfrew, *supra* note 27, at 344. One of the reasons for art museums' acquisition of unprovenanced material is their "cozy and acquiescent relationships with private collectors

result. Archaeologists maintain that museums, as the final repositories of private collections, are those that have underwritten the trade in looted objects.<sup>44</sup>

Thus far I have focused on the critical role that *consumers* play in fueling archaeological looting. Museums, private collectors and the middlemen – antiquities dealers and auction houses – create a market for unprovenanced objects that are likely looted, and thereby provide strong incentives and indirect support for the plunder.<sup>45</sup> Yet while consumers bear much of the responsibility for archaeological looting and destruction, they are not solely responsible. Obviously, much of the blame rests with the previous links in the chain, those located in the source countries.

The process begins with the looters. Those may be professional bandits, such as the *tombaroli* – Italy’s tomb raiders. In many other cases, however, looters are “subsistence diggers” – typically poor peasants in developing countries, for whom the excavation and sale of antiquities is an important supplement to a meager income.<sup>46</sup> The compensation these looters receive is, in fact, very modest. Usually, over 98% of the final price of an antiquity ends up in the hands of middlemen.<sup>47</sup> Moreover, as antiquities are a finite resource, looting is not economically sustainable in the long run. Nevertheless, looting has persisted and has provided

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<sup>44</sup> BRODIE, DOOLE & WATSON, *supra* note 15, at 25.

<sup>45</sup> BRODIE, DOOLE & WATSON, *supra* note 15, at 5, 30; Brodie and Renfrew, *supra* note 27, at 344-345, 348; Howard Spiegler & Lawrence Kaye, *American Litigation to Recover Cultural Property: Obstacles, Opinions, and a Proposal*, in TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD’S ARCHAEOLOGICAL HERITAGE 121, 130 (Neil Brodie, Jennifer Doole, & Colin Renfrew eds., 2001).

<sup>46</sup> Brodie, *supra* note 3, at 3-4; Kersel, *supra* note 29, at 190.

<sup>47</sup> It has been estimated, for example, that looters in the Petén region of Central America received \$200-\$500 each for vessels which might ultimately be sold for \$100,000. BRODIE, DOOLE & WATSON, *supra* note 15, at 13; Kersel, *supra* note 29, at 190 (quoting Borodkin); W. Alva, *Destruction of the Archaeological Heritage of Peru*, in TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD’S ARCHAEOLOGICAL HERITAGE 89, 93 (Neil Brodie, Jennifer Doole, & Colin Renfrew eds., 2001); Brodie, *supra* note 3, at 16.

much needed income not only to individuals, but to whole communities.<sup>48</sup> Some of the solutions to the looting problem thus focus on educating local populations and raising their awareness to the importance of archaeological heritage and to the benefits they may derive from its preservation, such as tourism revenue and local pride.<sup>49</sup>

The unauthorized excavation and export of antiquities is prohibited by law in most archaeologically-rich countries. In fact, in most countries, archaeological heritage is in public ownership<sup>50</sup> through a national ownership law that vests ownership of archaeology in the State. National ownership is usually accompanied by a stringent export control regime that often amounts to a near-absolute ban on the export of antiquities, with very narrow exceptions. Even when private ownership of antiquities is allowed, their export, in most cases, is highly circumscribed.<sup>51</sup> Yet law enforcement authorities overwhelmingly fail to enforce the laws protecting archaeological heritage. Plunder often takes place as if the law did not exist. Why do source countries fail to prevent the looting of antiquities and their flow abroad? The problem often lies in inadequate bureaucratic and law enforcement capacity. Guarding archaeological sites and monuments is an extremely demanding task in term of funds and personnel, especially when the territory is large and the number of possible looting targets is high. A serious effort to curb looting also requires action by the police, customs, and border officials. Yet law enforcement agencies, especially in developing countries, are often under-staffed and under-

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<sup>48</sup> For example, in the very poor Ghor es-Safi, Jordan an entire community participated in robbing the remains of the biblical city of Zoar. Konstantinos Politis, *Dealing with the Dealers and Tomb Robbers: The Realities of the Archaeology of the Ghor es-Safi in Jordan*, in *ILLICIT ANTIQUITIES: THE THEFT OF CULTURE AND THE EXTINCTION OF ARCHAEOLOGY* 257, 257-259 (Neil Brodie & Kathryn Walker Tubb eds., 2002); Kersel, *supra* note 29, at 199.

<sup>49</sup> Brodie and Doole, *supra* note 1, at 4; PATRICK O'KEEFE, *TRADE IN ANTIQUITIES: REDUCING DESTRUCTION AND THEFT* 90-92 (1997).

<sup>50</sup> Brodie, *supra* note 3, at 2.

<sup>51</sup> For examples of antiquities legislation see LYNDEL PROTT & PATRICK O'KEEFE, *HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY* (1988).

financed; moreover, protecting archaeological heritage ranks low on their priorities.<sup>52</sup> The result is a systematic failure of law enforcement agencies to curb looting and outflow of antiquities. Another cause for this failure is corruption. In exchange for a bribe, poorly-paid officials may be willing to turn a blind eye to illegal excavation and export of antiquities.<sup>53</sup> In other cases, allowing the plunder of cultural heritage is an easy way for the authorities to put money in the pockets of poor peasants. By contrast, anti-looting efforts would deprive the local population of an important source of income and could cause social unrest.

### III. INTERNATIONAL REGULATION OF ANTIQUITIES: THE 1970 UNESCO CONVENTION

#### *A. The Purpose of International Regulation*

How can an international agreement assist in preventing the plunder of archaeology? Looting is made possible by the failure of source countries to enforce their laws prohibiting unauthorized excavation and export of antiquities. *International regulation of antiquities aims to make up for the regulatory incapacity of source countries by shifting the burden of control to market countries and inducing them to control inflows of antiquities.* By restraining market countries' demand, the driver of looting, source countries seek to reverse the outflow of antiquities. If market countries establish proper import controls and seize looted antiquities at points of entry, those antiquities may be returned and incentives for further looting should decline. Import

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<sup>52</sup> Alva, *supra* note 47, at 95; E. Özgen, *Some Remarks on the Destruction of Turkey's Archaeological Heritage*, in *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE* 119, 119 (Neil Brodie, Jennifer Doole, & Colin Renfrew eds., 2001); Prott, *supra* note 16, at 58.

<sup>53</sup> BRODIE, DOOLE & WATSON, *supra* note 15, at 16-17; H. Shuzhong, *Illicit Excavation in Contemporary China*, in *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE* 19, 24 (Neil Brodie, Jennifer Doole, & Colin Renfrew eds., 2001).



controls in market countries would thus compensate for the weakness of export controls in source countries.

Given its purpose, international antiquities regulation has sparked intense political conflict between source countries and market countries. The push and support for international regulation has come primarily from antiquities-rich countries attempting to curb archaeological looting. By contrast, market countries have shown very little enthusiasm for international regulation. From market countries' point of view, international regulation constitutes an undesirable shift of responsibility, asking them to tackle a problem that *other countries* face. Tackling the problem entails costs: an administrative burden for the government as well as damage to consumers of antiquities: trade practitioners (art dealers and auctioneers), museums, and collectors. These costs, however, are not offset by any real gains to market countries; source countries are those that reap the benefits of a regulated antiquities trade. The attempts to establish international regulation have therefore been riddled by sharp disagreements between source and market countries not only over the degree and design of regulation, but over the fundamental question of its *desirability* in the first place. Source countries have considered unregulated antiquities trade to be harmful to their archaeological heritage; market countries, by contrast, have viewed unregulated trade as a boon to their economy and culture. Market countries have therefore advocated free movement of antiquities, questioned the need for international regulation, and repudiated the shifting of the burden of control onto them. The next section briefly examines the international political conflict over regulation of antiquities before turning to the heart of the article – the puzzling course of the American policy: from opposition to regulation to cautious support.

## *B. The International Political Conflict over Antiquities Regulation*

The political conflict between source countries and market countries has been evident since the inception of the efforts to control the movement of cultural property<sup>54</sup> after World War I. Inspired by considerable destruction of cultural property during that War and the increasing trade in cultural material in its aftermath<sup>55</sup>, the League of Nations prepared a draft *Convention on the Repatriation of Objects of Artistic, Historical or Scientific Interest, Which Have Been Lost, Stolen or Unlawfully Alienated or Exported*. The draft was submitted to the Member States of the League in 1933 and met with criticism from three major market countries: The Netherlands, Britain, and the United States.<sup>56</sup> The rejection of this draft Convention led the League to prepare another draft titled *Convention for the Protection of National Historic or Artistic Treasures*, which was also rejected by the major market countries. The outbreak of World War II set aside the regulatory efforts.<sup>57</sup>

Regulation of the antiquities trade reappeared on the international agenda in the 1960s as a result of two factors. First, the magnitude of the trade and its negative externalities was increasing. The spread of higher education heightened the demand for cultural and artistic experiences; the number of private collectors was going up. With rising prices and an expanding world market, looting reached unprecedented levels. Second, decolonization sharply increased the number of states facing looting of antiquities and wishing to curb the plunder. As long as plunder took place in territories under colonial rule, local populations could do little to protest.

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<sup>54</sup> Cultural property is a broad concept that includes a variety of culture-related objects, such as paintings, ethnological objects and antiquities. However, the focus of the international efforts, especially since the 1960s, has been the protection of antiquities. See also note 61, *infra*.

<sup>55</sup> KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 193 (1994).

<sup>56</sup> PATRICK O'KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC 9-10 (2000).

<sup>57</sup> *Id.* at 10, 14.

With independence and membership in international organizations, the new post-colonial states had the opportunity to voice their concern over looting and promote international action against it.<sup>58</sup>

The efforts for international control of antiquities were initiated by Mexico and Peru, two countries that had suffered large-scale plunder and loss of antiquities. The two countries raised the issue of the illicit trade in cultural property during the 11th General Conference of UNESCO in 1960.<sup>59</sup> In response to their appeal for an international convention, the General Conference adopted a resolution authorizing the Director General to prepare “a report on appropriate means of prohibiting the illicit export, import and sale of cultural property, including the possibility of preparing an international instrument on this subject.”<sup>60</sup> This resolution began a decade-long process that culminated in the drafting of the UNESCO Convention by a Special Committee of Governmental Experts convened in Paris in April 1970 and the adoption of the Convention by the 16<sup>th</sup> General Conference of UNESCO on November 14, 1970.

Throughout the 1960s, market countries voiced serious concern and skepticism about the emerging convention. Britain, for example, identified “insuperable practical difficulties in defining and physically distinguishing ‘cultural property’ for the purposes of an effective import or export control”; it also maintained that “[t]he burden of control should not be shifted to the importing countries.”<sup>61</sup> Switzerland questioned the need for and utility of international

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<sup>58</sup> JOTE, *supra* note 55, at 196; Ronald Abramson & Stephen Huttler, *The Legal Response to the Illicit Movement of Cultural Property*, 5 LAW & POL’Y INT’L BUS. 932, 933-934 (1973).

<sup>59</sup> *Revised Draft Resolution submitted by the Delegations of Mexico and Peru*, UNESCO Doc. 11C/DR/186 (December 1, 1960).

<sup>60</sup> Records of the General Conference of UNESCO, Eleventh Session, Paris 1960, Resolution 11C/4.412(d).

<sup>61</sup> *Replies to Circular Letter CL/1667 and Document UNESCO/CUA/123, Received from Member States by 10 February 1964*, UNESCO/CUA/123 Add. I Annex I, 22 (March 21, 1964). Article 1 of the UNESCO Convention defines the concept of “cultural property” in very broad terms. The

regulation, asserting that if source countries “are not able to prevent such exports [of cultural property] which they consider undesirable, by measures prompted by their own domestic legislation, it is not easy to see how international cooperation ... can be any more successful in removing the main difficulties which are inherent in this very intricate problem.”<sup>62</sup> Sweden maintained that “a control system of such a complicated and expensive nature as the one proposed ... cannot be accepted by the Swedish authorities.”<sup>63</sup> Germany held that “essential parts of the Preliminary Draft Convention are not feasible.”<sup>64</sup>

Like other market countries, the United States expressed doubts throughout the 1960s “regarding the practicability of controlling illicit traffic in cultural property at the international level ... .” The US view was “that the problem of illicit traffic of cultural property cannot best be solved through an international agreement”. Rather, the onus was on *source countries* to curb the trade: “We do believe that individual nations can do much to control the export from their territory of materials which they believe should be retained”. UNESCO, the United States maintained, can assist countries in designing legislation and organizing local agencies to protect their cultural property.<sup>65</sup> Furthermore, the United States considered the emerging Convention to be biased in favor of source countries and their desire to retain antiquities, without giving due consideration to the “important values [which] are served by a reasonable flow of art objects and

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Article allows each state to designate as cultural property “property which, on religious or secular grounds, is ... of importance for archaeology, prehistory, history, literature, art or science” and which belongs to one of several categories including, among others, antiquities, paintings, rare manuscripts, and antique furniture. Although the definition of cultural property encompasses a large variety of objects, archaeological objects constitute the *raison d’être* of the Convention.

<sup>62</sup> UNESCO/CUA/123 Add. I Annex I, 15 (March 21, 1964).

<sup>63</sup> *Replies to Circular Letter CL/2041 and to Document SHC/MD/3 Received from States on 27 January 1970*, UNESCO Doc. SHC/MD/5 Annex 1, 16 (February 27, 1970).

<sup>64</sup> UNESCO Doc. SHC/MD/5 Add. 1, 7 (April 10, 1970).

<sup>65</sup> *Replies to Circular Letter CL/1667 and Document UNESCO/CUA/123, Received from Member States by 10 February 1964*, UNESCO/CUA/123 Add. I Annex I, 23-24 (March 21, 1964).

archaeological materials among nations.” While accepting the need for cooperation against the illicit trade in cultural property, the United States argued that international cooperation should be realistic; that international efforts should not displace the primary responsibility of source countries; and that such efforts should attempt not only to suppress the illicit trade, but also to promote legitimate commerce and sustain a reasonable interchange of cultural property among nations.<sup>66</sup> Beyond this general view, the most serious American concern was the proposed establishment of *import controls*.<sup>67</sup> According to the United States,

“[T]he Preliminary Draft Convention would require each party to give effect through its own customs laws to whatever export controls may be imposed by any other party... [even when those export controls] totally restrict [] international commerce in cultural property ... . Every State has the right to establish whatever export controls it may choose, but it is difficult to expect a State to give effect through its legislation and administrative processes to foreign legislation that may not take into account in any respect the interests of that State or of the international community. It is one thing to seek international co-operation for the recovery and return of stolen art treasures of national importance, or to stem a flood of exports that threatens seriously to damage the cultural heritage of a people. It is quite another thing to expect States to enforce foreign laws that could lead to the elimination of all significant international movement of art objects of cultural importance and thus diminish the cultural experience of all peoples. The United States does not rule out appropriate international co-operation in the enforcement of reasonable regulations controlling the export of cultural property in cases of demonstrated gravity. However, the United States would be reluctant to agree in advance to undertake this responsibility for any and all export control systems of unknown character and scope.”<sup>68</sup>

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<sup>66</sup> *Replies to Circular Letter CL/2041 and to Document SHC/MD/3 Received from States on 27 January 1970*, UNESCO Doc. SHC/MD/5 Annex I, 20-21 (February 27, 1970).

<sup>67</sup> Another concern related to “those provisions of the Preliminary Draft Convention requiring governmental control of internal transfers and of exports” of cultural property. “[F]or the United States to adopt legislation of the scope envisioned by the Preliminary Draft Convention would mean the introduction of entirely new governmental controls of private activity and new responsibilities of the federal government in relation to the States.” *Id.* at 21.

<sup>68</sup> *Id.*

Market countries' hostility to the idea of international antiquities regulation translated into action or, more precisely, inaction. Britain and Switzerland – two key market countries – did not even attend the 1970 meeting of experts that drafted the final text of the Convention. Both countries did not suffer archaeological plunder and were not particularly concerned about archaeological damage in foreign countries. They, did, however want to avoid a bureaucratic burden and protect their local art markets. As a result, Britain and Switzerland adopted an uncompromising anti-regulation view, manifested in their absence from the 1970 negotiations and their rejection of the Convention. Other market countries did attend the negotiations, yet chose not to ratify the Convention. France expressed the fear that strengthening customs controls might result in border delays.<sup>69</sup> The Netherlands maintained that “checks by customs officials have appeared impractical, if not impracticable. ... [E]xamining shipments on such a large scale as to allow for a deterring effect is regarded neither practically possible nor desirable, because it would considerably hamper the flows of trade.”<sup>70</sup> Germany argued that the Convention “may create considerable uncertainty for all persons concerned in trading in works of art” and that “the practical implementation of the Convention with regard to the maintenance of inventories, frontier controls, customs investigation, accounting and control of the art trade would require the

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<sup>69</sup> *Reports of Member States on the Action Taken by Them to Implement the Recommendation on the Means of prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property (1964) and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO Doc. 20 C/84, 35 (September 15, 1978).

<sup>70</sup> Quoted in *Proposals for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO Doc. 22 C/93, 3 (August 30, 1983). Switzerland held a similar view. According to Switzerland, “[i]mplementation of a system of authorizations or even of simple surveillance would require establishing a complicated and costly administrative apparatus whose effectiveness would necessarily be only relative in view of Switzerland’s intense border traffic as a transit country and the difficulties involved in customs surveillance in the mountain regions.” UNESCO Doc. 20 C/84, 42.

establishment of an administrative machinery of untenable proportions.” Germany further asserted that “no country with a liberal legal regime is likely, on account of legal and practical difficulties, to be able to implement the Convention.”<sup>71</sup>

Throughout much of the 1960s, the United States shared market countries’ concerns over and suspicion of international antiquities regulation. Yet in the late 1960s the United States broke ranks with the other market countries. The United States chose to attend the 1970 negotiations of the UNESCO Convention and played an important role in its drafting. Furthermore, the United States began the process of ratification and implementation soon after the adoption of the Convention by UNESCO. Whereas all other major market countries persisted in their rejection of the Convention for decades, the United States was intent on joining it immediately. I now turn to examine why the United States chose to pursue a different course from that of other market countries and support the UNESCO Convention, a convention that imposed costs on the American art market and law enforcement agencies without offering much tangible benefit to the United States itself.

#### IV. US POLICY ON THE INTERNATIONAL REGULATION OF ANTIQUITIES, 1969-1983

The late 1960s and early 1970s constituted a revolutionary period in US policy, in which the traditionally-liberal approach to the antiquities trade gave way to the acceptance of regulation. Granted, the transformation was far from complete. The United States did not come to embrace antiquities regulation wholeheartedly and did not adopt the pro-regulation view of source countries. In fact, the United States established very limited controls on the international movement of antiquities by implementing merely two of the UNESCO Convention’s provisions.

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<sup>71</sup> UNESCO Doc. 22 C/93, pp. 3-4.

Nevertheless, the United States made a conscious choice to reverse the laissez-faire attitude which had allowed the import of looted antiquities into the country. Even the modest measures taken by the United States have been significant, given its status as the world's largest art market. Moreover, US policymakers saw the shift in the American position as an exercise of moral leadership which would show the way to other market countries. It would take three decades for those countries to follow the US example and join the UNESCO Convention.

#### *A. The American Motivation: Why Act against Plunder Abroad?*

Before delving into the details of antiquities regulation, a key question requires an answer: What was the American motivation? The primary motivation underlying the US support for protecting archaeology through international regulation was *not* self interest. The United States itself is not rich in archaeology, and looting of American antiquities has never constituted a major problem. Rather, the American goal was to *help foreign countries protect their archaeological heritage*. The question, then, is what inspired the US government to adopt this selfless goal in the late 1960s and early 1970s. Why tackle archaeological plunder *abroad* at the expense of the American art market?

Antiquities looting in itself was not a new phenomenon at that point, yet in the course of the 1960s, the antiquities market flourished and expanded along with the worldwide looting required to feed it. As indicated earlier, an increase in the number of collectors provided growing demand for antiquities; on the supply side, new roads and new means of transportation opened up previously inaccessible areas, and technological innovations made the digging and robbing easier.<sup>72</sup> The growth in the scale of looting and destruction undoubtedly formed the background for the American involvement in the protection of archaeology, but a conscious effort was

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<sup>72</sup> See KARL MEYER, *THE PLUNDERED PAST* 12-14 (1973).



necessary in order to place the issue on the national agenda and encourage policymakers to take action. Policymakers needed to be educated about the negative externalities of the antiquities trade imposed on foreign countries. This is where the archaeological community came to play a vital role. American archaeologists considered the uncontrolled trade in antiquities to be a major cause for looting of antiquities and loss of historical knowledge. They used their knowledge and expertise to urge the US government to curb the harmful trade.

The initial US interest in antiquities regulation can, in fact, be attributed largely to the work of a single archaeologist, Clemency Coggins. Coggins shed scholarly light on the magnitude of the looting problem, its implications, and – most importantly – the role played by American museums in fueling the destruction of archaeology. Coggins’ publications, combined with several scandals involving museums and journalistic accounts of the trade, brought looted antiquities into the limelight. They attracted the attention of policymakers, educated them about the issue, and spurred them into action.

Clemency Coggins was a doctoral student at Harvard University, specializing in Pre-Columbian art and archaeology, and a research associate at Harvard’s Peabody Museum. In 1969 she published an article titled “Illicit Traffic in Pre-Columbian Antiquities” in *Art Journal*. The article opened with the following forceful words:

In the last ten years there has been an incalculable increase in the number of monuments systematically stolen, mutilated and illicitly exported from Guatemala and Mexico in order to feed the international art market. Not since the sixteenth century has Latin America been so ruthlessly plundered.<sup>73</sup>

The article focused on the illicit removal and export of stelae, large stone slabs carved with Maya inscriptions and figures, erected in front of pyramids and temples. In her article, Coggins

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<sup>73</sup> Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94, 94 (1969).

explained how looters had been using power saws and other tools to cut the stelae into small segments and sell the pieces separately. Coggins was by no means the first archaeologist to complain about looting, yet her article raised more awareness and attracted more attention to the problem than any previous publication. As Paul Bator testifies, Coggins' 1969 article was an "important milestone" and "played an important role in giving credibility to the contention that the illegal traffic in art treasures is a problem that has to be taken seriously."<sup>74</sup> Coggins did not expect the article to have political impact. Her intended audience was museums and art historians and her main goal was to make museums aware of the dubious source of the objects they had been buying.<sup>75</sup> Why, then, did the article resonate so strongly well beyond the museum community? There are several reasons.<sup>76</sup>

First, the article "was not the usual impressionistic account and denunciation of illicit pot hunting."<sup>77</sup> Coggins did not protest the looting of obscure objects from little known sites. Rather, she documented the theft of acknowledged archaeological masterpieces, some registered as national monuments, from known sites, including sites which had been excavated and published. Second, the article provided detailed evidence of the looting in the form of a two page fine-print list of specific stone sculptures and reliefs stolen from Guatemala and Mexico. The list dramatized the problem and cast it in concrete and tangible terms which were hard to ignore. It is one thing to hear about looting in the abstract and quite another to read a painstakingly detailed account of the breaking into pieces and sawing off of important monuments. Third, Coggins

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<sup>74</sup> BATOR, *supra* note 14, at 1, 4. Bator was a Harvard Law School professor who served on the ASIL art trade panel (see below) and, as indicated above, a member of the US delegation to the UNESCO Special Committee that negotiated the 1970 UNESCO Convention.

<sup>75</sup> Interview with Clemency Coggins, professor of archaeology and of art history at Boston University, in Boston, MA (June 2008).

<sup>76</sup> BATOR, *supra* note 14, at 1-4

<sup>77</sup> BATOR, *supra* note 14, at 2.

exposed the tragic consequence of looting. The cutting, sawing, and smashing of stelae sacrificed much of their aesthetic value and also compromised their value to science and scholarship. As stelae were broken into moveable, saleable pieces, some inscriptions were lost; so was information necessary for studying the stelae and deciphering their inscriptions, such as the original location of a stela and its placing within a site. Coggins thus demonstrated that archaeological looting was far more than ordinary theft. It involved the destruction of objects and of the historical knowledge they carried.

Fourth, and most importantly, Coggins pointed to American museums as the primary beneficiaries of looting, since the stolen and mutilated archaeological remains came to rest in their collections. Eminent institutions such as the Cleveland Museum of Art, Houston Museum of Fine Arts, and the Minneapolis Institute of Arts were implicated, along with dealers, private collectors, and European museums.<sup>78</sup> Coggins managed to draw a direct line between the looting of archaeology in developing countries and the art world in rich countries. Tracing looted pieces to respectable museums brought an end to their pretense of having no involvement with the trade in looted antiquities. “The cat was thus out of the bag.”<sup>79</sup>

In her following publications in the early 1970s, Coggins tried to reach a broader audience, outside the scholarly and museum communities. In particular, she aimed her efforts at policymakers.<sup>80</sup> With the establishment of the UNESCO Convention in 1970, looted antiquities became a political issue and educating policymakers was essential. In articles published in the

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<sup>78</sup> At the insistence of *Art Journal*, Coggins’ original article did not identify the museums by name, but traced the stelae to “American museums”. Coggins named the museums in an updated list published in 1970. BATOR, *supra* note 14, at 4, fn 8. Based on Coggins’ work and additional sources, Meyer listed looted sites in Guatemala and Mexico and museums displaying objects from those sites. MEYER, *supra* note 72, at 213-218.

<sup>79</sup> BATOR, *supra* note 14, at 4.

<sup>80</sup> Interview with Clemency Coggins, *supra* note 75.

*Smithsonian*<sup>81</sup> and *Science*<sup>82</sup> Coggins reiterated the charge against the US art world in more emphatic and elaborate terms. She asserted that archaeological “plunder has been financed by the international art market, by collectors and by most museums.”<sup>83</sup> She explained the motivations and incentives of the various actors in the antiquities market: the looter seeking money with which to buy food;<sup>84</sup> the art dealer who “has tempted the digger to destroy a part of his own past in order to offer” antiquities for sale, while at the same time whetting the appetite of collectors for those antiquities and marketing them as a wise investment<sup>85</sup>; collectors who see antiquities as beautiful objects, symbols of their own wealth, and ultimately – once donated to a museum – as tax deductions<sup>86</sup>; and American museums, whose educational goals and aspirations for universal collections resulted, perversely, in “omnivorous” conduct and willingness to buy looted material.<sup>87</sup> Coggins maintained that the haphazard removal of antiquities by looters harms the objects and their scholarly value. A recklessly excavated object, she argued, loses its historical meaning and can only be “beautiful but dumb.”<sup>88</sup>

Clemency Coggins used her knowledge and expertise to sensitize policymakers and educate them about the harmful effects of unregulated trade in antiquities. Yet Coggins was not the only cause of attention to the antiquities problem. Several highly-publicized scandals involving museums and collectors raised concerns about their questionable conduct and involvement with stolen art:

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<sup>81</sup> Clemency Coggins, *The Maya Scandal: How Thieves Strip Sites of Past Cultures*, 1(7) *SMITHSONIAN* 8 (1970).

<sup>82</sup> Clemency Coggins, *Archaeology and the Art Market*, 175(4019) *SCI.* 263 (1972).

<sup>83</sup> Coggins, *supra* note 81, at 10. See also Coggins, *supra* note 82, at 266.

<sup>84</sup> Coggins, *supra* note 81, at 10.

<sup>85</sup> *Id.*, at 11-12; Coggins, *supra* note 82, at 264.

<sup>86</sup> Coggins, *supra* note 81, at 10, 14; Coggins, *supra* note 82, at 264.

<sup>87</sup> Coggins, *supra* note 81, at 12-13.

<sup>88</sup> *Id.*, at 10.

- In 1972 the Metropolitan Museum of Art purchased a Greek vase known as the Calyx or the Euphronios Krater. The Museum argued that the vase had been acquired from an Armenian living in Beirut who did not want his identity revealed. In February 1973, however, the New York Times published a completely different account, charging that the Met had bought the vase from an expatriate American living in Rome, and that the vase had been looted from an Etruscan tomb. Italian authorities made a similar charge shortly thereafter. The Met defended its acquisition and vehemently denied the tomb-robbing story.<sup>89</sup> Only in January 2008 did the Met return the vase to Italy.<sup>90</sup>
- In December 1969 the Boston Museum of Fine Arts announced a sensational acquisition of an unknown portrait by Raphael. According to the Museum, the portrait was purchased from a private European collection in Switzerland. Italian authorities, however, revealed that the Museum had apparently purchased the portrait in Italy, rather than Switzerland, and that it had been removed from Italy in secret. The seller was an art dealer with past criminal convictions for antiques smuggling who had been outlawed as a dealer in Italy. Moreover, US Customs discovered that the Museum had brought the portrait into the United States without declaring it. The painting was seized by Customs and returned to Italy.<sup>91</sup>
- In 1972 the wealthy California collector Norton Simon purchased an important Hindu sculpture (the “Nataraga”) that had been stolen from a village temple in Southern India. In 1973 it was announced that the idol would be exhibited at the Met. Under pressure

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<sup>89</sup> BATOR, *supra* note 14, at 4-5, fn 12; MEYER, *supra* note 72, at 86-100.

<sup>90</sup> Elisabetta Povoledo, *Ancient Vase Comes Home to a Hero's Welcome*, N.Y. TIMES, January 19, 2008.

<sup>91</sup> BATOR, *supra* note 14, at 4, fn 11; MEYER, *supra* note 72, at 102-106.

from the Indian government, the Met agreed to cancel the planned exhibition. India then filed a law suit to recover possession of the sculpture.<sup>92</sup>

These scandals and others<sup>93</sup> received wide media coverage. They triggered further journalistic investigations into the looting and destruction of archaeology and the role played by the US art market.<sup>94</sup> Of particular importance was the account of Karl Meyer in several *New Yorker* articles<sup>95</sup> and in his 1973 book *The Plundered Past*. The book was a comprehensive exposé of the American art world and its involvement in “one of the world’s sadder problems, the destruction and theft of the remains of the human past.”<sup>96</sup> According to Meyer, “no one who makes even a cursory inquiry can doubt that the great majority of antiquities offered for sale is indeed smuggled goods.”<sup>97</sup> His book examined the entire chain of the trade: from the looters, through the unscrupulous – and even outright deceitful – conduct of certain dealers<sup>98</sup>, to the complicity of museums and collectors in acquiring plundered material.

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<sup>92</sup> BATOR, *supra* note 14, at 5, fn 13; MEYER, *supra* note 72, at 144-145.

<sup>93</sup> Other major cases of illegally removed objects involved Turkish treasures turning up in Dumbarton Oaks and the Boston Museum of Fine Arts as well as a statue from Cameroon discovered in Dartmouth College. MEYER, *supra* note 72, at 58-63; BATOR, *supra* note 14, at 5, fn 13.

<sup>94</sup> See, for example, a series of New York Times articles by journalist Robert Rheinhold on the theft of Mayan archaeology: Robert Rheinhold, *Looters Impede Scholars Studying Maya Mystery*, N.Y. TIMES, March 26, 1973; Robert Rheinhold, *Traffic in Looted Maya Art is Diverse and Profitable*, N.Y. TIMES, March 27, 1973; Robert Rheinhold, *Elusive Maya Glyphs Yielding to Modern Technique*, N.Y. TIMES, March 28, 1973.

<sup>95</sup> BATOR, *supra* note 14, at 6, fn 15.

<sup>96</sup> MEYER, *supra* note 72, at xiii.

<sup>97</sup> MEYER, *supra* note 72, at 123-124.

<sup>98</sup> For example, Meyer quoted the following admission of a dealer about how he had provided his pieces with a veneer of legitimacy: “I know several indigent counts who would be delighted, for a price, to swear that any piece of mine was part of the family collection for centuries.” MEYER, *supra* note 72, at 15.

Coggins' work, the media scandals, and the journalistic accounts all managed to stir concern and put the trade in looted antiquities on the national agenda. They paved the way to the introduction of antiquities regulation.

### *B. Regulatory Precursors: US-Mexico Treaty and the Pre-Columbian Act*

The trade in looted antiquities was first discussed by President Lyndon Johnson and Mexican president Diaz Ordaz during their meeting in October 1967, and they agreed to explore possible methods to control the unauthorized movement of antiquities between the United States and Mexico.<sup>99</sup> Cooperation began in earnest in 1969, when Mexico, in a note to the State Department, requested US assistance in the protection of its archaeological heritage in exchange for continued Mexican cooperation in the recovery and return of American stolen cars.<sup>100</sup> The Mexican request introduced Mark Feldman, then assistant legal adviser for inter-American affairs at the State Department, to the problem of looted antiquities and began his long-term involvement with the issue. Feldman came to play a key role in bringing the United States to support and implement the UNESCO Convention.

According to Feldman, maintaining cooperation on the return of stolen cars was only one reason to meet the Mexican request and extend cooperation on antiquities. The other reason was genuine interest in helping Mexico conserve its archaeological heritage. As Feldman recalls:

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<sup>99</sup> *Message from the President of the United States Transmitting the Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Signed at Mexico City on July 17, 1970*, 91<sup>st</sup> Cong., 2<sup>nd</sup> Sess., III (September 23, 1970); *Recovery and Return of Stolen Archaeological, Historical and Cultural Properties*, Report of the Senate Committee on Foreign Relations, 92<sup>nd</sup> Cong., 1<sup>st</sup> Sess., 1 (February 9, 1971).

<sup>100</sup> Mexico assisted with the return of stolen cars to the United States pursuant to the 1936 US-Mexico Convention for the Recovery and Return of Stolen or Embezzled Motor Vehicles, Trailers, Airplanes or Component Parts of Any of Them. Interview with Mark Feldman, formerly at the State Department, in Washington DC (May 2008); *Recovery and Return of Stolen Archaeological, Historical and Cultural Properties*, *supra* note 99, at 2.

“ The issue was first brought to my attention by the Mexican government. When we looked into it, I was shocked at the extent to which pillage of archeological sites in Mexico and Guatemala threatened both the sites themselves and the record of human civilization, and I became persuaded that international art markets, including the US market, were part of the problem. Heretofore, the US government had resisted the concept of providing legal mechanisms in this country to enforce foreign legislation, but I thought it important to do something ... [through] a series of measures intended to balance the national interest in cultural exchange with the national interest in preserving the world’s cultural heritage.”<sup>101</sup>

Feldman was influenced by what he describes as “a pretty dramatic testimony of the extent of the destruction” provided by Clemency Coggins; archaeologist Ian Graham in his photographs of damaged Mayan ruins; and journalist Karl Meyer. Another influence was the media scandals involving museums, which made looted antiquities an issue of public attention. Feldman also received a first hand impression of the problem in several trips to Mexico. He ultimately negotiated a bilateral Treaty Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties.<sup>102</sup> The treaty was signed in July 1970 and quickly ratified upon the strong recommendation of the Senate Foreign Relations Committee, whose report expressed concern at the growing problem of archaeological looting and cited Coggins’ 1969 article in *Art Journal*.<sup>103</sup> Although art dealers initially voiced their opposition to this first attempt at regulating the trade, the State Department ultimately received their support for what was a very limited undertaking<sup>104</sup> (the Treaty’s main provision authorized the US Attorney General, upon Mexican request, to institute a civil action in a Federal court to recover and return pre-

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<sup>101</sup> Author’s correspondence with Mark Feldman, December 2008.

<sup>102</sup> Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, signed in Mexico City on July 17, 1970.

<sup>103</sup> *Recovery and Return of Stolen Archaeological, Historical and Cultural Properties*, *supra* note 99, at 3.

<sup>104</sup> Interview with Mark Feldman, *supra* note 100.



Columbian and colonial objects of “outstanding importance to the national patrimony” and critical historical documents).

Yet despite its narrow scope and bilateral nature, the treaty with Mexico was significant as a forerunner of the more comprehensive regulation established subsequently. The treaty broke new ground by signaling American interest in fighting archaeological looting and, for the first time, establishing a measure of control, even if circumscribed, over the movement of antiquities into the United States. The treaty was also significant as the first round in the US domestic debate over antiquities regulation. This early episode foreshadowed the much more intense struggle over the UNESCO Convention and established the contours of the political battle in years to come: support for regulation from the archaeological community; opposition from the trade (i.e., the dealers); and in the middle, the State Department – pushing for regulation, yet mindful of the need to secure the trade’s support.

In October 1972 Congress enacted a more comprehensive *unilateral* regulatory measure: *Act on Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals*. The Act responded to the demands of Latin American countries, particularly Guatemala, for the protection of their cultural heritage. The key to the Act’s successful passage was a consultative mechanism convened in 1969, at the State Department’s request, under the auspices of the American Society of International Law: Panel on the International Movement of National Art Treasures (hereafter ASIL Panel).<sup>105</sup> The panel included representatives from the trade, the museum community, the archaeological community and the State Department as well as international law experts. Through the panel, the State Department sought to reach consensus among all relevant stakeholders and, in particular, obtain the trade’s support for the introduction

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<sup>105</sup> BATOR, *supra* note 14, at 6, fn 16.

of regulatory measures. As Feldman observes: “If we had not had the private sector support from that Panel, we would not have gotten anywhere with this program.”<sup>106</sup>

Apparently, the trade saw the handwriting on the wall and recognized that mounting concern about archaeological looting could result in far-reaching regulation. It thus made sense for the trade to adopt a cooperative posture and agree to a specific measure limited to the vulnerable pre-Columbian market, in the hope of deflating the issue and halting the regulatory momentum. Following the recommendation of the ASIL Panel,<sup>107</sup> the 1972 Act prohibited the import into the United States of pre-Columbian monuments or architectural structures or parts thereof if exported contrary to the laws of their (Latin American) countries of origin.<sup>108</sup> The Act, it should be emphasized, covered relatively accessible sculpture and architecture and indeed managed to reduce the trade in these materials. This, however, had an unfortunate unintended consequence: providing further incentive for the looting of tombs and caches.<sup>109</sup> Another effect of the 1972 Act was to increase attention to the problem of looting,<sup>110</sup> precisely when the implementation of the UNESCO Convention up came on the agenda.

### *C. The United States and the 1970 UNESCO Convention*

As described above, the adoption of the UNESCO Convention in 1970 was the culmination of a decade of efforts by UNESCO to address the problem of antiquities looting. For most of that decade, the United States maintained a skeptical approach and did not engage seriously with

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<sup>106</sup> Interview with Mark Feldman, *supra* note 100.

<sup>107</sup> 116 CONG. REC. 20366 (June 18, 1970).

<sup>108</sup> See the analysis in Abramson & Huttler, *supra* note 58, at 939-942. The Act required an importer to present to customs, at the point of entry, a certificate issued by the country of origin confirming the legality of exportation. Import in violation of the Act subjected the goods to seizure and forfeiture under customs laws.

<sup>109</sup> Clemency Coggins, *United States Cultural Property Legislation: Observations of a Combatant*, 7 INT'L J. CULTURAL PROP. 52 (1998).

<sup>110</sup> Interview with Clemency Coggins, professor of archaeology and of art history at Boston University, in Boston, MA (May 2008).

UNESCO's regulatory efforts. Following its traditionally-liberal approach to the movement of cultural property, the US government sought to encourage the legitimate international exchange of antiquities and viewed with suspicion the attempts at regulation.<sup>111</sup> As late as 1968, the United States took the position that "further study was necessary before a practicable international convention could be developed."<sup>112</sup> At that stage, the US government was mindful only of the interests of American consumers of antiquities (dealers, museums and collectors) and indifferent to the trade's negative externalities. Yet the scholarly and media accounts of archaeological destruction in the late 1960s and early 1970s generated concern about the trade's externalities and caused policymakers to worry about looting abroad. At that point, the US government came under cross-pressures. It sought to strike a balance between the interests of the US art market on the one hand and those of foreign countries facing plunder on the other hand. This change manifested itself in a more favorable approach to the emerging UNESCO Convention and in a willingness to accept certain international controls.

Yet as a cross-pressured government, the United States supported far more modest regulation than that favored by source countries and rejected the comprehensive import controls which constituted the linchpin of the draft conventions circulated by UNESCO.<sup>113</sup> Specifically, the United States considered the draft convention proposed by the UNESCO Secretariat as a basis for the 1970 negotiations [Secretariat Draft] "unacceptable", objecting to what it saw as a

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<sup>111</sup> *Report of the United States Delegation to the Special Committee of Governmental Experts to Examine the Draft Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 2 (July 27, 1970) (hereinafter US Delegation Report).

<sup>112</sup> *Id.*

<sup>113</sup> *Preliminary Draft Convention Concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO Doc. SHC/MD/3 Annex (August 8, 1969) (Preliminary Draft Convention); *Revised Draft Convention Concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO Doc. SHC/MD/5 Annex III (February 27, 1970) (Secretariat Draft).

“blank check system of import controls” and various other “sweeping obligations.”<sup>114</sup> The first principle guiding the US position at the 1970 negotiations was therefore limited obligations and no blank check. The United States was interested in curbing archaeological looting, yet without closing down the US art market. It wanted to address major sensitive items, where a link between the American market and looting could be demonstrated. The United States therefore pushed to narrow down the scope of the Convention as much as possible and limit import restrictions to carefully-designated situations. Another key principle guiding the US delegation was non-retroactivity. This principle was of particular importance to American museums concerned about possible threat to their existing collections. Third, while the primary goal of the Convention was to elicit the cooperation of market countries, the United States also wanted source countries to reciprocate by strengthening their own efforts to protect cultural heritage and by liberalizing their antiquities export policy (e.g., through exchanges with museums).<sup>115</sup>

As an alternative to the draft proposed by the UNESCO Secretariat, the State Department prepared a comprehensive draft of its own, containing three substantive measures: 1. Provisions prohibiting the importation into a country of cultural property stolen from a museum or a similar institution in another country and providing for the recovery and return of such cultural property. 2. Provisions prohibiting the acquisition of illegally exported cultural property “of great importance” by museums whose acquisition policies are under governmental control of a state party to the Convention. 3. Provisions whose purpose was to identify specific crisis situations of

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<sup>114</sup> BATOR, *supra* note 14, at 95-97.

<sup>115</sup> Interview with Mark Feldman, *supra* note 100; Leonard DuBoff et al., Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 4 SYRACUSE J. INT’L L. 97, 113-114(1976); *Hearing on H.R. 5643 and S. 2261 before the Subcommittee on International Trade of the Committee of Finance, United States Senate*, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 17-18 (February 8, 1978).

pillage and to provide for future action, including selective import controls, to address them. These provisions established an undertaking for future assistance requiring further negotiations in each case.<sup>116</sup>

The Secretariat Draft constituted the basis for the 1970 negotiations in Paris. The United States delegation discovered to its surprise that UNESCO rules would prevent the introduction of its comprehensive alternative draft. Alternatives thus had to be introduced piecemeal as amendments to specific provisions.<sup>117</sup> As expected, certain source countries like Ghana and Iraq, joined by the Communist countries, favored tight international controls and resisted the attempt to dilute the Secretariat Draft. Other countries, most notably Mexico, supported the Secretariat Draft yet realized the need to reach a compromise document that the United States would accept. The purpose of the Convention was to constrain market countries and their demand for antiquities. A Convention rejected by the largest market country, the United States, would have lost much of its value.

Ultimately, the United States, through joint work with other delegations,<sup>118</sup> managed to make major modifications to the Secretariat Draft, the most important of which were: 1. Deletion of the provision requiring states to prohibit the import of any item of cultural property not accompanied by an export certificate. 2. Modification of various provisions through language allowing each state to determine what measures are appropriate for it or limiting obligations to measures consistent with states' existing legislation (for example, Article 10(a) requires states to regulate antique dealers, but this obligation is qualified by the words "as appropriate for each country", inserted at the US suggestion). 3. Unlike the Secretariat Draft, the final Convention

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<sup>116</sup> BATOR, *supra* note 14, at 97.

<sup>117</sup> BATOR, *supra* note 14, at 98.

<sup>118</sup> Especially the Mexican, French and German delegations. US Delegation Report, *supra* note 111, at 5.

allowed for reservations.<sup>119</sup> As a result of these modifications, the final text of the 1970 UNESCO Convention was a significantly diluted version of what the source countries had envisioned. As a member of the American delegation, Paul Bator, put it, “[t]he text of the UNESCO Convention was the product of US leadership in persuading a majority of UNESCO to adopt a moderate and compromise position. The position of the Soviet bloc countries and many third-world countries, which would have effectively ended all international trade in cultural objects, was rejected.”<sup>120</sup>

The United States indeed succeeded in fashioning a convention more suited to its preference for limited regulation,<sup>121</sup> a convention that fell short of the ambition of source countries. Yet the US support for even modest regulation was groundbreaking and revolutionary. For the first time, a major market country accepted certain responsibility for archaeological looting and expressed willingness to share in the burden of addressing this problem. As Mark Feldman puts it, “the big change was the recognition ... [that] the US art markets were contributing in a significant way to this looting.”<sup>122</sup> This recognition was also manifested in the State Department report accompanying the transmittal of the UNESCO Convention for Senate ratification in early 1972. To be sure, the report pointed out several American self-interests in ratification:

1. “[T]he appearance of important art treasures of suspicious origin in the United States gives rise to problems in our relations with foreign countries”.

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<sup>119</sup> US Delegation Report, *supra* note 111, at 5-6.

<sup>120</sup> BATOR, *supra* note 14, at 68.

<sup>121</sup> Interview with Mark Feldman, *supra* note 100.

<sup>122</sup> *Id.* This recognition was also reflected in the statement delivered by Feldman at the opening of the 1970 negotiations in Paris. In his statement, Feldman called upon source countries to make the critical effort against looting at home, but acknowledged that the international art market “does provide an inducement for exports that may aggravate the situation in certain countries.” US Delegation Report, *supra* note 111, at 41.

2. Certain source countries have responded to the looting problem by restricting the work of American archaeologists within their territories; the Convention could create a climate more conducive to archaeologists' work abroad.
3. By allaying the anxieties of source countries, the Convention would encourage them to relax their strict restrictions on the export of antiquities.
4. The Convention's prohibition on import of objects stolen from museums would benefit American museums.<sup>123</sup>

Yet the State Department report made it clear that the primary motivation underlying the US support for the Convention was not self-interest; rather, it was concern about the pernicious effects of unregulated trade on foreign countries: wholesale depredations, mutilation and robbing of archaeology intended "to feed a flourishing international art market".<sup>124</sup> The motivation was the US sympathy "to this effort to help other countries stem the illegal outflow of their national art treasures" and an "honest desire to deal with the problem".<sup>125</sup> Feldman confirms that while US relations with the hemisphere were indeed a concern, the main issue was the extent of depredation and the desire to respond to what was seen as a real problem abroad.<sup>126</sup> Influenced by the archaeological community,<sup>127</sup> the State Department came to realize that "the then-current US position was no longer viable in the face of increasing international consciousness of the importance of archaeological objects" and "that the United States ha[d] a responsibility to put its

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<sup>123</sup> *Message from the President of the United States transmitting the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 92<sup>nd</sup> Cong., 2<sup>nd</sup> Sess., XII (February 2, 1972); *Convention on Ownership of Cultural Property, Report of the Senate Committee on Foreign Relations*, 92<sup>nd</sup> Cong., 2<sup>nd</sup> Sess., 8, 11 (August 8, 1972); DuBoff et al., *supra* note 115, at 115; *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 17.

<sup>124</sup> *Message from the President*, *supra* note 123, at V.

<sup>125</sup> *Message from the President*, *supra* note 123, at XII-XIII.

<sup>126</sup> Interview with Mark Feldman, *supra* note 100.

<sup>127</sup> *Id.*

own house in order to the extent that the American art market [was] a major, if not the single most important, incentive for this despoliation.”<sup>128</sup>

The State Department report was also significant in that it identified the Convention’s main operative provisions, according to the American understanding: Article 7(b) and Article 9.<sup>129</sup>

- Article 7(b)(i) requires States to prohibit the import of cultural property *stolen from a museum, public monument or similar institution* in a State Party to the Convention, provided that such property is documented in the inventory of that institution. Rather than requiring market countries to prohibit the import of all illegally exported objects, this Article limits the import prohibition to a small subset of objects – those stolen from an institution where they were inventoried. The Article thus excludes the vast majority of looted antiquities – those which have been illegally excavated and smuggled and do not appear in any inventory. In those cases covered by Article 7(b)(i), Article 7(b)(ii) requires States Parties to take steps to recover and return the stolen object, at the request of the source country.
- Article 9 addresses situations in which a State Party finds its cultural heritage “in jeopardy from pillage.” In those circumstances, other States Parties are required to participate in a concerted international effort and to carry out necessary concrete measures, including export and import control.

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<sup>128</sup> DuBoff et al., *supra* note 115, at 112, 115.

<sup>129</sup> *Message from the President*, *supra* note 123, at VI. The State Department report included Article 7(a) among the Convention’s important provisions, but made clear that “this provision would apply primarily to institutions controlled by the Federal Government.” *Id.* See also *Convention on Ownership of Cultural Property*, *supra* note 123, at 1, 11-12.



Singling out these two provisions reflected the American view that “only a small fraction of the Convention was intended to have serious operative consequences; the rest has only rhetorical existence.”<sup>130</sup> Articles 7(b) and 9, both taken from the proposed American draft, were thus “the heart of the Convention and ... its major operative provisions.”<sup>131</sup> This interpretation of the Convention, however, is by no means the only one possible. As O’Keefe points out in his scholarly commentary on the Convention, the rest of the Convention is “empty only if one chooses to make it so.”<sup>132</sup> In his commentary, O’Keefe interprets other Convention provisions as establishing important substantive obligations.<sup>133</sup> The narrow reading espoused by the United States was the result of its position as a cross-pressured country facing anti-regulation incentives as a major market for antiquities as well as pro-regulation incentives resulting from concern about looting abroad. These conflicting incentives in combination yielded a preference for modest international regulation.

Upon the favorable recommendation of the Foreign Relations Committee,<sup>134</sup> the Senate gave its advice and consent to the ratification of the UNESCO Convention by a vote of 79 to 0 on August 11, 1972, subject to one reservation and six understandings. Those were established

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<sup>130</sup> BATOR, *supra* note 14, at 94-95.

<sup>131</sup> BATOR, *supra* note 14, at 101-102. Bator dismisses the rest of the Convention: Article 2 is “clearly rhetorical rather than substantive”; Article 3 is a “mysterious provision that will not be operative in the United States” given the understanding adopted by the Senate; Article 4 “would seem to have no operative effects”; the expression “as appropriate” in Article 5 leaves implementation entirely to each state’s discretion; Article 6 is “an unfortunate holdover from the Secretariat Draft” which “forced the United States to make a formal reservation”; Article 10 contains “an unenforceable undertaking”; and the obligations in Article 13 were “drained of significance by the fact that they are all made subject to the phrase ‘consistent with the laws of each State.’” *Id.*

<sup>132</sup> O’KEEFE, *supra* note 56, at 41 (referring to Article 2 of the 1970 UNESCO Convention).

<sup>133</sup> O’Keefe maintains, for example, that Articles 3 and 6 of the UNESCO Convention in combination require states to treat as unlawful the import of goods which were illegally exported from another state. *Id.* at 42, 55.

<sup>134</sup> *Convention on Ownership of Cultural Property*, *supra* note 123, at 8.

together with the State Department and limited significantly the application of the Convention in the United States.<sup>135</sup> The Senate's advice and consent allowed the United States to join the Convention formally, but it was decided not to deposit the instrument of ratification until after the passage of the legislation implementing the Convention. As a result of the prolonged debate over the Convention's implementation (hereafter implementation debate), the United States did not officially join the Convention until 1983.

#### *D. The Battle over the UNESCO Convention's Implementation*

As indicated earlier, the State Department was well aware of the need to achieve the approval of the relevant stakeholders, especially the trade, for the Convention's implementation. The ASIL Panel was the vehicle to obtain that approval. In the run-up to the 1970 negotiations of the Convention, the Panel studied the proposed drafts, and the sharp US criticism of the Secretariat Draft was influenced by the Panel's advice. A subcommittee of the Panel considered the Convention that resulted from the 1970 negotiations and recommended its approval by the United States "with certain explicit reservations and understandings."<sup>136</sup> According to Mark Feldman, the consultations with the relevant constituencies yielded a "pretty strong consensus", on the basis of which the State Department drafted the implementing legislation and transmitted it to Congress in 1973.<sup>137</sup> Consistent with the American reading of the Convention, the legislation focused on implementing Articles 7(b) and 9. Moreover, the Convention's Article 9 did not require further agreements for implementation;<sup>138</sup> yet the proposed legislation required

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<sup>135</sup> Interview with Mark Feldman, *supra* note 100. See the reservation and understandings in *Convention on Ownership of Cultural Property*, *supra* note 123, at 9.

<sup>136</sup> *Message from the President*, *supra* note 123, at XII; BATOR, *supra* note 14, at 6 (fn 16), 96.

<sup>137</sup> Interview with Mark Feldman, *supra* note 100; DuBoff et al., *supra* note 115, at 102; see also at 111-112 ("[The implementing legislation] represents the result of very long discussions with various interested American communities as to what the Government's position should be.")

<sup>138</sup> O'KEEFE, *supra* note 56, at 74.

the conclusion of agreements between the United States and individual source countries as a precondition for the imposition of import controls, thereby creating a hurdle for cooperation.<sup>139</sup>

The State Department believed that the proposed legislation protected all the relevant interests and conformed to the understandings with the trade.<sup>140</sup> But the consensus quickly dissipated. The trade, initially on board, soon began to voice serious concerns and skepticism about the proposed legislation which, it claimed, far exceeded what the ASIL Panel originally foresaw<sup>141</sup> and “would tend to remove the United States from the flourishing international art market.”<sup>142</sup> The trade’s vigorous opposition managed to delay Congressional action. Congress practically ignored the implementing legislation proposed in 1973, and the State Department thus had to revise its original proposal and resubmit it in 1975. This revised version was introduced as H.R. 14171 in June 1976. The political battle that ensued was hard-fought and prolonged. The following analysis aims to provide the larger picture of that debate by focusing on the main contenders: the archaeologists, the dealers and the museums. I first discuss these actors’ views and demands and then explore their lobbying methods and strategies. I also examine the differing attitudes of the House and the Senate to the UNESCO Convention’s implementation.

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<sup>139</sup> The requirement of further negotiations on a case-by-case basis for the establishment of agreements on import controls was included in the US alternate draft at the 1970 negotiations. Abramson & Huttler, *supra* note 58, at 958; BATOR, *supra* note 14, at 97. See also *Message from the President*, *supra* note 123, at IX-X.

<sup>140</sup> Interview with Mark Feldman, *supra* note 100.

<sup>141</sup> Interview with Mark Feldman, *supra* note 100; *Hearings on H.R. 5643 before the Subcommittee on Trade of the Committee on Ways and Means, House of Representatives*, 95<sup>th</sup> Congress, 1<sup>st</sup> Session, 42 (April 26, 1977).

<sup>142</sup> DuBoff et al., *supra* note 115, at 107-111.

## 1. Archaeologists

### a. Arguments made by the Archaeologists

Given that the purpose of the UNESCO Convention was to curb the looting and destruction of archaeology, its strongest advocates in the United States have been the archaeologists. As early as December 1970, the Archaeological Institute of America (AIA) expressed wholehearted support for the Convention and urged its earliest possible ratification.<sup>143</sup> Throughout the implementation debate, from 1976 onwards, the archaeologists have been the most ardent supporters of the legislation and expressed great concern about what they perceived as attempts to weaken the legislation and delay its passage. In their written and oral statements before Congress, the archaeologists<sup>144</sup> argued that American dealers and collectors supported and sponsored the looting and destruction of archaeological sites in poor countries all over the world, leading to the depletion of those countries' national heritage as well as to the loss of tourism income. Implementation of the Convention, in the archaeologists' view, was "an important first step toward redressing a cultural and economic drain the United States has long imposed on many of these countries".<sup>145</sup> The archaeologists also argued that action against antiquities looting was in the interest of mankind, since antiquities are a vanishing resource which is a part of the *world's* cultural heritage.<sup>146</sup> Furthermore, they maintained that implementation of the Convention

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<sup>143</sup> Resolution Adopted by the Council of the Archaeological Institute of America at its Meeting on December 30, 1970. ART LAW: DOMESTIC AND INTERNATIONAL 569 (Leonard DuBoff ed., 1975). See also the resolutions of the Society for American Archaeology and American Anthropological Association in support of the UNESCO Convention. *Id.*, 570-572.

<sup>144</sup> The archaeologists' camp included several professional associations as well as academic departments and individual archaeologists.

<sup>145</sup> *Written Comments on H.R. 14171, Subcommittee on Trade of the Committee on Ways and Means, House of Representatives*, 94<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 54 (August 3, 1976); *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 60, 68.

<sup>146</sup> *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 60.

was in the interest of knowledge, as it would curb the loss of context and historical information resulting from illegal excavation and removal of antiquities.<sup>147</sup>

While the archaeologists based their appeals primarily on the importance of archaeology and cultural heritage, they also tried to cast the problem in broader terms which may resonate with those unmoved by the damage to archaeology. They argued that “[t]he image of the United States and the question of our good faith in cultural relations are at stake. ... [This] is an indispensable step toward international understanding. This is a matter of great importance not only to professionals concerned with preservation of cultural heritage.”<sup>148</sup> Implementation of the Convention, according to the archaeologists, concerned “the posture which the United States wishes to assume before the community of nations.”<sup>149</sup> Whereas the dealers were against the United States going it alone without other market countries, the archaeologists called upon the United States to assert leadership on the antiquities problem and thereby encourage the Europeans to follow suit.<sup>150</sup>

Another line of argument attempted to undermine the legitimacy of the dealers’ and collectors’ opposition to the legislation. The archaeologists portrayed the dealers as a small, well-financed, and powerful special interest group “protecting the continued financial profit of a few individuals.” They characterized private collectors as interested in antiquities for “private delight”, for investment purposes, or out of “keen appreciation of the tax benefits that come the

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<sup>147</sup> *Written Comments on H.R. 14171*, *supra* note 145, at 65; *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 60.

<sup>148</sup> *Hearings on H.R. 5643*, *supra* note 141, at 132.

<sup>149</sup> *Id.*, at 108.

<sup>150</sup> *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 69, 73; *Hearing on H.R. 3403 before the Subcommittee on Trade of the Committee on Ways and Means, House of Representatives*, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess., 34 (September 27, 1979).

way of donors to museums.”<sup>151</sup> By contrast, the archaeologists presented themselves as a large constituency, far outnumbering the dealers. More importantly, they claimed to be motivated not by narrow self interest, but by the desire to protect the archaeological resources of all nations and to promote scientific knowledge.<sup>152</sup> The archaeologists also contrasted their fight for their own cause with the dealers’ use of professional lobbyists.<sup>153</sup>

In substantive terms, the archaeologists rejected the arguments made by the legislation’s opponents. They repudiated the argument that source countries did not protect their own antiquities and that these antiquities were therefore better off in the United States, where they would be cared for, enjoyed, and studied. According to the archaeologists, such a paternalistic argument reflected an imperialist attitude and was more at home in 19<sup>th</sup> century England than 20<sup>th</sup> century America.<sup>154</sup> To the argument that since the context had already been destroyed we might as well buy the looted objects once they are out of the ground, the archaeologists retorted:

“[S]uch an argument overlooks the fact that the purchase is what finances the thievery, the smuggling, the destruction. The argument itself, in fact, must give encouragement to those prepared to plunder ancient sites, for they know that if they can just get the material out of the ground and out of the country, there are people in America and other countries ready to buy.”<sup>155</sup>

The archaeologists also repudiated the dealers’ argument concerning the diversion of the trade to other market countries if the United States alone implemented the Convention. Arguing that ‘if

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<sup>151</sup> *Hearing on H.R. 3403, supra* note 150, at 31, 34. See also Letter from Clemency Coggins to Congressman Charles Vanik, Chairman of the House Subcommittee on Trade (September 27, 1979) (on file with author): “There is no more time to worry about the livelihood of art dealers and the aesthetic pleasures of collectors.”

<sup>152</sup> *Hearing on H.R. 3403, supra* note 150, at 31; *Hearings on H.R. 5643, supra* note 141, at 87, 97.

<sup>153</sup> Letter to Congressman Charles Vanik, Chairman of the House Subcommittee on Trade (May 27, 1977) (on file with author); *Hearings on H.R. 5643, supra* note 141, at 87, 97.

<sup>154</sup> *Hearings on H.R. 5643, supra* note 141, at 111; *Hearing on H.R. 3403, supra* note 150, at 32.

<sup>155</sup> *Hearing on H.R. 5643 and S. 2261, supra* note 115, at 61.

Americans do not buy the objects the Japanese, Germans or others would buy them’ was irrelevant and cynical, the archaeologists maintained, and it ignored the ethical considerations involved. “Somewhere, sometime, somebody ought to say stop. Just because everybody else is doing it, ... because the materials are still going to go to other countries, does not mean that we might as well throw up our hands and join in the crowds.”<sup>156</sup> “It would be ... shameful to avoid unilateral action simply because it might remain unilateral. Someone must take the first big step. ... the US [should] be the one.”<sup>157</sup>

The archaeologists’ response to the argument concerning the right of Americans to enjoy and own antiquities was that there was no “right” to purchase stolen goods and that the “wealth and desire ... of some Americans to own ancient art objects is [not] a proper substitute for the sovereign rights of other nations.”<sup>158</sup> To the claim that source countries themselves were to blame for not protecting their own cultural heritage, the archaeologists’ response was that “few of these nations can afford the great expense involved in guarding all their sites; and the logistical problem is overwhelming. Moreover, it is intolerable for the United States to tell these nations that if they do not – or cannot – protect all their sites it naturally follows that we have the right to plunder them.”<sup>159</sup> The archaeologists also rejected the dealers’ contention that the implementing legislation would bring an end to the trade in art and prevent the import into the United States of *all* art: “[P]assage of the bill will allow the free flow of art, art honestly and honorably acquired, to continue to come to the United States.”<sup>160</sup>

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<sup>156</sup> *Id.*, at 72.

<sup>157</sup> *Id.*, at 75.

<sup>158</sup> *Id.*, at 61.

<sup>159</sup> *Id.*, at 68.

<sup>160</sup> *Id.*, at 69.

As the legislative process slowly progressed, the archaeologists protested the delays, the revisions of the implementing legislation to meet the dealers' demands, and the dealers' persistent pressure despite the revisions in their favor. In the archaeologists' view, the legislation had become "a highly selective, and relatively weak tool."<sup>161</sup> Nevertheless, they urged its passage as an important and necessary step which would save archaeological sites from plunder and would motivate other market countries to take similar action.<sup>162</sup>

### **b. Archaeologies' Methods of Advocacy**

Two factors facilitated the archaeologists' organizing in support of the implementing legislation and allowed them to overcome a possible collective action problem. First, they had a direct professional stake in stemming the looting of antiquities. Most importantly, the destruction of archaeology threatened their ability to study the past. A secondary concern was the retaliation of source countries against the US antiquities market by restricting the work of American archaeologists.<sup>163</sup> Given that the trade in looted antiquities had a large and immediate impact on archaeologists, they had a strong motivation to act politically. A second factor was the archaeologists' pre-existing organization in professional associations, most notably the Archaeological Institute of America. These associations provided an institutional foundation upon which the archaeologists could build their advocacy efforts.

Throughout the legislative process in Congress, representatives of the archaeological community provided multiple written and oral statements and sent letters to individual members of Congress. The archaeologists used their statements and correspondence to make the arguments discussed above and to convey to legislators the magnitude of archaeological

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<sup>161</sup> *Hearing on H.R. 3403, supra* note 150, at 30.

<sup>162</sup> *Hearing on H.R. 5643 and S. 2261, supra* note 115, at 75.

<sup>163</sup> *Hearing on H.R. 3403, supra* note 150, at 35.



devastation, to which the US art market bore some responsibility. In addition to verbal descriptions, archaeologists provided photographs of looted sites to demonstrate visually the extent of destruction.<sup>164</sup> The statements and letters also attempted to generate a sense of urgency, as Congress was dragging its feet on the implementing legislation. Clemency Coggins, who led the advocacy efforts on behalf of the Archaeological Institute of America, expressed this urgency in a letter to Senator Ribicoff (D-CT), chairman of the Senate's Subcommittee on International Trade: "A decade has passed since it has become obvious that there is a crisis situation and there is no more time to hear from the proponents of the status quo – every moment that is lost brings us closer to the total loss of mankind's cultural heritage."<sup>165</sup> In another letter, Coggins described the looting she had witnessed in Guatemala, "the direct result of the years of [Congressional] inaction on this Convention."<sup>166</sup>

Archaeologists also held personal meetings with members of Congress to enlist their support. Coggins recalls that members of Congress were initially uninformed about the subject and open to persuasion. They were overall receptive to the archaeologists' views and came to recognize the importance of curbing the looting of antiquities: "[O]ur position was obviously motherhood and apple pie."<sup>167</sup> However, those members of Congress who came under counter-pressure from the dealers, ultimately gave them their support. Unlike the dealers, who were

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<sup>164</sup> See, for example, photographs from Peru and Guatemala included in a Letter from Clemency Coggins to Senator Ribicoff (February 27, 1978) (on file with author).

<sup>165</sup> *Id.*

<sup>166</sup> Letter from Clemency Coggins to Senator Ribicoff (November 27, 1978) (on file with author). See also letter from Clemency Coggins to Congressman Vanik, *supra* note 151: "[W]hile the bill has been stalled the serious destruction of archaeological sites has become significantly worse".

<sup>167</sup> Interview with Clemency Coggins, *supra* note 110.

represented by a Washington law firm, the archaeologists did not have a permanent presence in Washington, and this handicapped their advocacy efforts.<sup>168</sup>

The main tool at the archaeologists' disposal was their knowledge and expertise, and they appealed to legislators through principled arguments on the importance of archaeology and through moral persuasion. Yet archaeologists also tried to use their numerical advantage over the dealers and win legislators' support as *voters*. In a July 1982 Public Action Alert, the Archaeological Institute of America urged legislation supporters to send letters to members of the Senate Finance Committee, who were considering the legislation at the time, to "demonstrate clearly that we out-number [the dealers] as voters." Supporters were asked to urge a favorable vote on the bill, oppose all weakening amendments, and – if their Senator was running for reelection that year – state that they would be considering his stand on this issue when voting.<sup>169</sup> Coggins, writing to the Senate Finance Committee on behalf of AIA, noted that the organization "represent[s] 10,000 professional archaeologists and lay enthusiasts ... [It] is a grass roots organization with its membership in 81 chapters across the United States, in addition to the 50,000 subscribers of its magazine Archaeology".<sup>170</sup>

## 2. Antiquities Dealers

### a. Arguments Made by the Dealers

International regulation of antiquities could pose a very real threat to dealers by restricting their ability to buy antiquities, import them into the United States, and sell them to collectors and museums. Accordingly, the dealers vehemently opposed the legislation implementing the

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<sup>168</sup> *Hearing on H.R. 3403, supra* note 150, at 36.

<sup>169</sup> July 1982 Public Action Alert From the Archaeological Institute of America (on file with author).

<sup>170</sup> Letter from Clemency Coggins to Robert E. Lighthizer, Chief Counsel, Senate Committee on Finance (July 31, 1982) (on file with author). Emphasis in original.

UNESCO Convention. They launched a vigorous lobbying effort in an attempt to defeat it altogether or, at the very least, weaken it.

What concerns did the dealers raise? The dealers professed support for the goals of the UNESCO Convention, but opposed the proposed legislation as “an extraordinarily ill-advised means of implementing that Convention – a means which needlessly poses severe hazards to the enjoyment of art in the United States”.<sup>171</sup> The dealers denounced the legislation as a “Draconian” measure, constituting “extremely shortsighted cultural policy” and “a cultural disaster to the United States”.<sup>172</sup> The dealers’ ire focused on the implementation of the Convention’s Article 9 which involved the imposition of import restrictions on archaeological material through bilateral agreements between the United States and source countries.<sup>173</sup> In their oral and written statements to Congress, the dealers made the following arguments:

1. The legislation conferred upon the State Department sweeping authority, a “blank check”, which could be used to embargo the import into the United States of almost all antiquities. This “could cripple the growth of public museum collections in the United States and result in a severe cultural deprivation of the American public.” Giving such broad authority to the State Department, the dealers maintained, was not required either by the spirit or the letter of the UNESCO Convention. The proposed legislation did require the Executive Branch, as a precondition for the conclusion of bilateral agreements with source countries, to reach certain findings through consultation with a panel of experts. The dealers argued, however, that the making of these findings would be “ritualistic and pro forma in nature”. Since the finding

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<sup>171</sup> *Written Comments on H.R. 14171*, *supra* note 145, at 18.

<sup>172</sup> *Hearings on H.R. 5643*, *supra* note 141, at 31, 42, 113.

<sup>173</sup> The dealers had no objection to the implementation of Article 7 of the UNESCO Convention. *Written Comments on H.R. 14171*, *supra* note 145, at 19, fn 3.

requirements were vague and could not be appealed to a court or overruled by Congress, they would not constitute an effective check on the State Department's broad discretion.<sup>174</sup>

2. The dealers were extremely concerned that the State Department would use its powers to the benefit of foreign countries and to the detriment of the US art market:

“The Department of State ... is not primarily interested in fostering the enjoyment of art by citizens of the United States. On the contrary, its primary responsibility is to foster better international relations. This overriding interest of the Department makes it almost inevitable that the powers conferred upon it by the proposed legislation will be employed ... for purposes unrelated for the preservation of art ... . Indeed, the State Department could and undoubtedly would employ its powers under the proposed legislation as a counter in diplomatic negotiations on matters far removed from the protection of art objects and archaeological sites.”<sup>175</sup>

US action on antiquities, the dealers argued, would be given “as a sop to any Third World nation for more immediate important goals, trade goals, such as oil or arms.”<sup>176</sup> The State Department would simply “barter[] and regulate[] the import of art in exchange for cotton quotas, military bases, help in drug legislation and the like.”<sup>177</sup>

3. Article 9 of the Convention called for a “concerted international effort” in response to archaeological pillage. The implementing legislation, however, contained no references to multilateral cooperation and contemplated action by the United States alone. In fact, at the time of the implementation debate in Congress no major market country except the United States had expressed interest in implementing the Convention. By acting alone in imposing import restrictions, the dealers argued, the United States would not make any meaningful contribution to the preservation of archaeology and would not significantly assist in curbing plunder in foreign

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<sup>174</sup> *Written Comments on H.R. 14171*, *supra* note 145, at 18, 21; *Hearings on H.R. 5643*, *supra* note 141, at 32.

<sup>175</sup> *Written Comments on H.R. 14171*, *supra* note 145, at 22.

<sup>176</sup> *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 55.

<sup>177</sup> DuBoff et al., *supra* note 115, at 107-111.

countries. Rather, “unilateral import embargoes” would merely divert the flow of antiquities from the United States to other market countries. “The delighted beneficiaries of the legislation will thus be the museums and collectors of Switzerland, West Germany, France and Japan” who “can hardly wait for the United States to enact such legislation”. In fact, the responses in those countries to the proposed US legislation ranged from “condescending disbelief to unmitigated glee”. By contrast, the dealers argued, American import restrictions would penalize the museum-going public in the United States. “All that this bill guarantees is that the art works will go to the Tokyo museum, not the Toledo museum. The American public will have made a costly and yet totally unnecessary sacrifice in terms of the cultural enrichment of this country.”<sup>178</sup>

4. The implementing legislation did allow the import of antiquities subjected to import control upon satisfaction of certain documentation requirements. The dealers, however, considered those requirements to be rigid and unrealistic, especially in light of the secrecy typical of the antiquities trade. Moreover, failure to meet those requirements would have resulted in seizure of the imported objects by customs. The dealers believed that the onerous documentation requirements and the “unduly punitive remedy” of seizure would have a significant chilling effect as to completely shut down legitimate trade. “No owner is going to send art to the United States even when he is absolutely sure that it may legally be imported when the cost of failure to ‘satisfy’ US Customs is the Draconian penalty of confiscation.”<sup>179</sup>

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<sup>178</sup> *Written Comments on H.R. 14171*, *supra* note 145, at 20; *Hearings on H.R. 5643*, *supra* note 141, at 31, 34, 44. See also *Hearing on H.R. 3403*, *supra* note 150, at 40: “We believe that such action by sister states is the sine qua non of any meaningful response to the problems addressed by the convention ... Unquestionably, the United States unilateral action would merely be tilting at windmills. We would close our borders to art objects that simply would find their way to Swiss collectors or Japanese museums or German institutions.”

<sup>179</sup> *Hearings on H.R. 5643*, *supra* note 141, at 31, 34, 40-41; *Hearing on H.R. 3403*, *supra* note 150, at 41; *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 47.

5. The dealers argued that source countries themselves were responsible for the destruction of their own cultural heritage through construction projects and industrial development that disregarded archaeology and through their failure to protect archaeological sites. By implementing the UNESCO Convention, the United States would thus do for source countries what they would not do for themselves. “[M]ust we always become the enforcers and policemen in the world???” Not only was this shifting of responsibility unfair, the dealers argued, but it was also ineffective. Only local policing by source countries themselves could prevent looting. Perversely, shutting down the US market may in fact encourage more looting in order to gain the same dollar income as before.<sup>180</sup>

6. According to the dealers, source countries hoarded antiquities and did not allow the export even of repetitive material. Museums in developing countries were filled to overflowing, far beyond their capacity. In those museums, objects were badly preserved and could be defaced or destroyed. These objects were better off as “invaluable and instructive additions to the collections of many American museums”.<sup>181</sup>

#### **b. The Dealers’ Goals and Methods of Advocacy**

The dealers – led by the American Association of Dealers in Ancient, Oriental and Primitive Art (hereafter The Association) – hired the DC law firm Arnold & Porter to represent them in the implementation debate and lobby on their behalf. Lawyer James Fitzpatrick represented the dealers in the legislative battles from 1975 through the enactment of the Convention on Cultural Property Implementation Act in 1983. According to Fitzpatrick, the dealers’ goal in the UNESCO implementation battle was to “avoid harm”, that is, minimize the interference with the

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<sup>180</sup> *Hearings on H.R. 5643, supra* note 141, at 41, 44-45, 114.

<sup>181</sup> *Hearing on H.R. 5643 and S. 2261, supra* note 115, at 50-51.

traditional working of the art market based on the principle of free trade. Specifically, the dealers had the following main objectives:<sup>182</sup>

1. Involving experts in decision making on foreign countries' requests for import restrictions in order to give voice to the art community and to US cultural interests.
2. Insulating the decision making process from political considerations and, specifically, from the State Department influence. The dealers had in mind the precedent of the bilateral treaty with Mexico, in which the United States granted cooperation on antiquities in exchange for Mexican cooperation in returning stolen cars. Since "[t]he State Department is not in the business of saying no to foreign countries",<sup>183</sup> the dealers sought to grant the authority over import restrictions to an agency other than the State Department that would make decisions on cultural – rather than diplomatic – grounds.<sup>184</sup>
3. Making US action part of a multinational response to the problem of archaeological looting, rather than a unilateral effort. The dealers urged that the burden of responding to the problem be shared with dealers abroad both as a matter of business competition and as a matter of fairness. The same applied to museums: "If a museum in Omaha cannot import these [antiquities], why should the Louvre [and] the British Museum" be able to import them?<sup>185</sup> According to the

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<sup>182</sup> Interview James Fitzpatrick, Retired Partner, Arnold & Porter, in Washington, DC (May 2008).

<sup>183</sup> *Id.*

<sup>184</sup> Among other proposals, the dealers suggested that "Congress should reserve to itself the discretion to impose import controls and should not delegate that power to the State Department." *Hearings on H.R. 5643, supra* note 141, at 38. More concretely, the dealers proposed to make Congress a key participant in the imposition of import restrictions, by establishing import controls through Congressional legislation in each and every case; by submitting the bilateral agreements with source countries to Senate ratification; or by allowing either the House or the Senate to veto import restrictions before they go into effect. *Written Comments on H.R. 14171, supra* note 145, at 22-23; *Hearings on H.R. 5643, supra* note 141, at 36.

<sup>185</sup> Interview with James Fitzpatrick, *supra* note 182.

dealers, such burden sharing was, in fact, required by the explicit terms of Article 9 of the Convention which called for a “concerted international effort.” Therefore, they sought assurances “that the United States will act cooperatively and meaningfully with other art-importing nations ... and will not fruitlessly determine to go it alone.” They proposed that the legislation make US action conditional upon ratification of the UNESCO Convention and enactment of enabling legislation by a significant number of art-importing countries.<sup>186</sup>

In addition to these three primary goals, the dealers advanced several additional proposals:

- Toughen the requirements for the imposition of import restrictions. The dealers wanted the legislation to “make clear that such an embargo is indeed an exceptional measure and is designed to meet exceptional circumstances” and “to require a specific finding that the [looting is] ... of an extraordinary and critical nature ....” They also urged greater specificity in the finding that the source country had taken measures to protect its own cultural heritage, since “[i]t is all too common for a nation tacitly to encourage a thriving domestic trade in its own antiquities and then bitterly decry the exportation of antiquities when such exportation is publicized.” The dealers also proposed that the powers of the Executive Branch to enter into bilateral agreements on import restrictions would expire after five years, and that the agreements themselves would be limited in time.<sup>187</sup>
- Overturn the McClain decision. In 1977 the US government prosecuted several dealers under the National Stolen Property Act (NSPA) for conspiring to import and trade in looted archaeological objects from Mexico. Mexico enacted legislation in 1972 vesting ownership of all unexcavated antiquities in the Mexican nation. The Court of Appeals examined the

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<sup>186</sup> *Written Comments on H.R. 14171*, *supra* note 145, at 23; *Hearings on H.R. 5643*, *supra* note 141, at 32, 37-38; *Hearing on H.R. 3403*, *supra* note 150, at 40, 43.

<sup>187</sup> US House of Representatives 1976, 23; US House of Representatives 1977a, pp. 32, 37-38; US House of Representatives 1979, pp. 40, 43.



legislation and found it to be establishing Mexican ownership of the looted antiquities, even though they may never have been actually possessed by agents of Mexico. The Court concluded that the defendants knew and deliberately ignored Mexico's ownership claims and convicted them under NSPA.<sup>188</sup> Before Congress, the dealers maintained that the "extreme and oppressive" McClain decision was inconsistent with the implementing legislation. The legislation required "a careful, case by case and item by item negotiation and determination by our officials to determine what materials in particular should be barred entry"; recognizing and enforcing all-encompassing foreign ownership laws, as the McClain decision did, would undermine the legislation's purpose. The dealers therefore asked that the NSPA be amended to exclude acts of stealing where the ownership of the stolen property is based solely upon a declaration of national ownership of antiquities.<sup>189</sup>

How did the dealers go about accomplishing these goals? Statements and letters to Congress were an important tool for voicing the dealers' concerns. Members of the Association provided the vast majority of written and oral statements, but input was also received from the National Antique & Art Dealers Association of America as well as from individual dealers.<sup>190</sup> Harmer Rooke Numismatists, for example, submitted a petition signed by voters opposed to the

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<sup>188</sup> William Pearlstein, *Cultural Property, Congress, the Courts, and Customs: The Decline and Fall of the Antiquities Market?*, in WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 9, 14 (Kate Fitz Gibbon ed., 2005); Kelly Yasaitis, *National Ownership Laws as Cultural Property Protection Policy: The Emerging Trend in United States v. Schultz*, 12 INT'L J. CULTURAL PROP. 95, 98-99 (2005); Patty Gerstenblith, *Recent Development in the Legal Protection of Cultural Heritage*, in ARCHAEOLOGY, CULTURAL HERITAGE AND THE ANTIQUITIES TRADE 68, 69 (Neil Brodie, Morag Kersel, Christina Luke, and Kathryn Tubb eds., 2006).

<sup>189</sup> *Hearing on H.R. 3403*, *supra* note 150, at 44-45; *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 40-41; Pearlstein, *supra* note 188, at 18-19.

<sup>190</sup> *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 54; *Hearings on H.R. 5643*, *supra* note 141, at 113-115.

implementing legislation which would “cost thousands of jobs, millions in taxes ... [while serving] no useful purpose to the people of the United States of America.”<sup>191</sup>

The dealers quickly realized that the trade’s commercial concerns would be a poor basis for their campaign against the implementing legislation. “The winning argument would not have been: ‘Well, I am being put out of business.’”<sup>192</sup> Therefore, they presented themselves as acting not in their financial self interest, but in the interest of the “United States public – a public which has increasingly grown to appreciate the value of art.” The American public, the dealers maintained, was the primary loser from the implementing legislation, which would inflict upon it “the loss ... of a wide range of important works of art”<sup>193</sup> and cultural impoverishment. The legislation “will produce a considerable decline of interest in this country in the entire field of ancient and primitive art. There will be far fewer exhibitions, far fewer publications. Fewer young people will become interested. Funds for research and study will decline as popular interest wanes ... .”<sup>194</sup> In fact, the dealers argued that the American public had a *right* to enjoy, appreciate, and even own, foreign art. One justification for that right was that the US public is made up of descendants of immigrants from many countries, including in Africa and Latin America; Americans were thus morally entitled to a share of the art of their ancestors.<sup>195</sup> Another justification was that antiquities are the legitimate cultural heritage and property of all mankind, not exclusively of the countries where those objects were found.<sup>196</sup>

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<sup>191</sup> *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 187.

<sup>192</sup> Interview with James Fitzpatrick, *supra* note 182.

<sup>193</sup> *Hearings on H.R. 5643*, *supra* note 141, at 31.

<sup>194</sup> *Id.*, at 41.

<sup>195</sup> *Id.*, at 39..

<sup>196</sup> *Implementation of Convention on Cultural Property, Report of the Committee on Ways and Means to accompany H.R. 5643*, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess., 4 (September 21, 1977); *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 50-51.

The dealers also emphasized the importance of free trade in antiquities for museums. They pointed out that the great American museums had been built on two centuries of free trade and that the free movement of antiquities had allowed those museums to enrich the American public and its understanding of world culture.<sup>197</sup> Moreover, while established museums in the Northeast “have been filling their galleries and storerooms for generations” and had immensely rich collections, young museums in other parts of the country were now only building their collections; the implementing legislation with its restrictions on importing antiquities would inhibit the development of these museums.<sup>198</sup> The dealers did emphasize to Congress that many museums shared their objections to the legislation.<sup>199</sup> Yet despite the close cooperation between the dealers and museums that shared their views, those museums maintained an independent presence to enhance their influence on legislators. Whereas dealers were often viewed as “just businessmen”, museums were “in a more elevated position because ... they [were] representing a much broader, identifiable, supportable public interest ... [which gave them] moral suasion. They were not just representing commerce; they were representing culture.”<sup>200</sup>

While the dealers did attempt to win over legislators with persuasive arguments, the key to their influence over the legislation was their ties to Senator Patrick Moynihan (D-NY). Moynihan, who served on the Senate Finance Committee and its Subcommittee on International Trade, had significant clout over the legislation: “[H]e had the ‘go-no go’ power.”<sup>201</sup> The dealers approached other members of the Subcommittee as well, but Moynihan was their main ally in the legislative process, as he was committed to the free flow of cultural property. Moynihan learned

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<sup>197</sup> Interview with James Fitzpatrick, *supra* note 182.

<sup>198</sup> *Hearings on H.R. 5643*, *supra* note 141, at 39-40.

<sup>199</sup> *Hearing on H.R. 3403*, *supra* note 150, at 42-43.

<sup>200</sup> Interview with James Fitzpatrick, *supra* note 182.

<sup>201</sup> *Id.*

much about the issue as the US ambassador to India. He also served as chairman of the board of trustees of the Hirshhorn Museum. Most importantly, Moynihan was the senator from New York. As the center of the art trade is in New York City, the dealers were Moynihan's own constituency and enjoyed his support. With Moynihan holding veto power over legislation considered detrimental by his constituency, the legislative process suffered repeated delays and came to conclusion only when the bill was revised to the dealers' satisfaction. Senator Moynihan was, in fact, the chief architect of the final draft of the legislation.<sup>202</sup>

### 3. Collectors

Collectors are consumers of antiquities and may purchase them for different reasons: the aesthetic and historical value of the objects; the social status that comes with collecting art; or because antiquities are a wise financial investment and possibly – if donated to a museum – a tax deduction.<sup>203</sup> Collectors thus favor unimpeded access to antiquities; however, collectors' access to antiquities is less critical for them than it is for dealers, whose commercial livelihood depends on the import of antiquities. If inhibited from purchasing antiquities, rich collectors would channel their money elsewhere; therefore they have relatively weak incentives to organize politically against regulation.

Indeed, while collectors opposed the implementing legislation, they did not organize to lobby Congress and did not have an independent presence in the debate. They were represented by surrogates: museums, who acquire most of their antiquities as gifts or bequests from

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<sup>202</sup> James Fitzpatrick, *Stealth UNIDROIT: Is USIA the Villain?*, 31 N.Y.U. J. INT'L L. & POL. 47, 52 (1998).

<sup>203</sup> Neil, Brodie and Christina Luke, *Conclusion: The Social and Cultural Contexts of Collecting*, in *ARCHAEOLOGY, CULTURAL HERITAGE AND THE ANTIQUITIES TRADE* 303, 303-305 (Neil Brodie, Morag Kersel, Christina Luke, and Kathryn Tubb eds., 2006).

collectors; and the dealers, from whom collectors purchase.<sup>204</sup> Collectors did, however, send letters to Congress protesting the implementing legislation. A collector from Los Angeles was “horrified” to learn about the legislation which would deprive the American public of viewing ancient art and would merely divert that art to Europe and Japan.<sup>205</sup> Another collector argued that the legislation represented “a cultural tragedy of the greatest significance to the present and future generations of the American public” and would “cut off and suffocate further studies” of ancient cultures. Furthermore, maintained the collector, archaeological destruction resulted from lack of interest, ignorance, and corruption of source countries. “It is not the job of the American government to act as police for other countries.”<sup>206</sup> A New York collector asserted that the legislation would deprive American citizens “of the opportunity of improving the quality of their lives by the study and appreciation” of antiquities, especially in regions where museums are young. He further maintained that there was “no pressing reason why the United States should, in effect, either through misguided idealism or some kind of governmental machoism, put itself in the position of enforcing the laws and export regulations of other countries”; and that US unilateral action would be ineffective. “The material will be lost to the ‘countries of origin’ as before, but it will also be lost to American scholars and collections to no purpose whatsoever. ... ; the only lasting effect to be achieved will be to hold the United States up to ridicule for having stupidly cut off its cultural nose to spite its face.”<sup>207</sup>

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<sup>204</sup> Interview with James Fitzpatrick, *supra* note 182.

<sup>205</sup> *Hearings on H.R. 5643*, *supra* note 141, at 104.

<sup>206</sup> *Id.*, at 123-124.

<sup>207</sup> *Id.*, at 137-138.

#### 4. Museums

Museums are primary consumers of antiquities through purchase, gift, or bequest. In fact, as recipients of private collections, museums are the final repositories of most antiquities. Museums would thus be expected to resist international regulation, which could curb their acquisition of antiquities, hinder the development of their collections, and thereby limit the American public's exposure to foreign culture. Yet museums are also committed to another set of values. Museums "are grounded in the tradition of public service."<sup>208</sup> They are organized as non-profit institutions holding their collections in public trust, endowed with the mission and responsibility of serving and educating the public.<sup>209</sup> Such mission means that museums, in performing their professional duties, "must take affirmative steps to maintain their integrity so as to warrant public confidence. They must act not only legally but also ethically."<sup>210</sup> Acting in public trust and committed to ethical conduct, museums do not establish their views on regulation merely on the basis of narrow self-interest; they must also consider the ethical dimensions and normative implications of acquiring antiquities. Acquisition of looted material and encouragement of archaeological destruction undermine the public-trust responsibility of museums. Such practices also betray the commitment of museums to values such as knowledge, education, and the preservation of culture.<sup>211</sup> Museums therefore have normative reasons to endorse regulatory constraints on the trade in antiquities.

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<sup>208</sup> American Association of Museums, Code of Ethics for Museums, available at <http://www.aam-us.org/museumresources/ethics/coe.cfm> (last accessed October 16, 2008). See also Wardlaw Hamilton, *Museums Acquisition Policies*, in ART LAW: DOMESTIC AND INTERNATIONAL 363, 364 (Leonard DuBoff ed., 1975) ("A museum relies on public trust for its existence").

<sup>209</sup> Association of Art Museum Directors, Code of Ethics, available at <http://www.aamd.org/about/#Code> (last accessed October 16, 2008).

<sup>210</sup> American Association of Museums, Code of Ethics for Museums, *supra* note 208.

<sup>211</sup> BATON, *supra* note 14, at 83-84.

Museums may also have good *practical* reasons to support regulation. Acquisition of looted material could deal a blow to museums' reputation as respectable and ethical institutions. Tarnishing museums' reputation could threaten their lifeblood – public and government support through grants, donations, tax exemptions etc. Inappropriate acquisition of antiquities could also embroil museums in prolonged legal battles; and – if the antiquities are ultimately returned – could bring financial loss.

The important point for the purpose of the following analysis is that museums have more complex incentives than other consumers of antiquities (dealers and collectors). Museums are *cross-pressured* consumers: their desire to acquire and display the most valuable objects, as part of their educational mission, would lead them to oppose regulatory constraints, but this desire is tempered by normative and practical considerations which may push museums in the opposite direction, toward acceptance of ethical restrictions. As I discuss below, the balance of these conflicting incentives has varied across museums and over time.

Museums' acquisition policies became a matter of open debate for the first time in the early 1970s, when several museums adopted ethical acquisition policies. In April 1970 the University of Pennsylvania Museum announced it would no longer purchase antiquities unless accompanied by a pedigree, including information about the place of origin and the legality of export.<sup>212</sup> In 1971 Harvard University barred the acquisition by its museums of illegally exported

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<sup>212</sup> MEYER, *supra* note 72, at 74-75; The University of Pennsylvania Museum 1970 Declaration is reprinted in MEYER, *supra* note 72, at 254-255. Note that this policy applied only to purchases, but not to gifts from collectors. The Declaration was reaffirmed in a 1978 Acquisition Policy. JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 30 (2008).

objects.<sup>213</sup> Several other museums followed suit.<sup>214</sup> What led these museums to join the pro-regulation camp and, furthermore, establish voluntary self-regulation? The main proponents of these ethical acquisition policies were archaeologists serving in those museums who were genuinely concerned about looting and archaeological destruction.<sup>215</sup> But there were other considerations as well. As noted above, in the late 1960s and early 1970s several public scandals caused great embarrassment to major museums. Committing to ethical policies was thus a precautionary measure and a means to maintain public trust in museums. Another concern of universities in particular was that source countries might respond to inappropriate acquisitions by university museums through suspension of cooperation with other units of the university (for example, terminating joint research programs).<sup>216</sup> Finally, the new acquisition policies constituted a preemptive measure, as museums saw the handwriting on the wall. The 1970 UNESCO Convention; the shift in the US approach to antiquities; the mounting criticism of museums' conduct – all these did not bode well for museums, who anticipated growing public scrutiny and possibly increasing governmental regulation of their conduct. Museums' self-policing initiatives meant to preempt governmental control.<sup>217</sup> “If museums fail to stem the tide

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<sup>213</sup> The Harvard Museums 1971 Report is reprinted in MEYER, *supra* note 72, at 255-259 (Report of the Committee on the Acquisition of Works of Art and Antiquities). The Report applied to acquisition by purchase, gift, or bequest.

<sup>214</sup> Those include Field Museum of Natural History in Chicago, Brooklyn Museum, University of California Museum in Berkeley, Arizona State Museum, and the Smithsonian Institution. MEYER, *supra* note 72, at 259-262; Wardlaw Hamilton, *Museums Acquisitions: The Case for Self-Regulation*, in ART LAW: DOMESTIC AND INTERNATIONAL 347, 357 (Leonard DuBoff ed., 1975).

<sup>215</sup> Interview with Clemency Coggins, *supra* note 75.

<sup>216</sup> CUNO, *supra* note 212, at 29. The 1971 Harvard Report made that point: “The violation, real or apparent, of regulatory legislation by one branch of the University is likely to have adverse effects upon the legitimate interests of all other branches of the University who pursue activities within the countries in question; and a bad reputation, once gained, is difficult to improve.”

<sup>217</sup> Interview with Mark Feldman, *supra* note 100.



of criticism by their own acts, legislators may take the initiative away from them.”<sup>218</sup> Not all museums, however, adopted ethical acquisition policies. Some museums, especially art museums relying on acquisition on the open market rather than through archaeological fieldwork, were reluctant to hinder the development of their collections by accepting ethical constraints.<sup>219</sup> This split within the museum community foreshadowed museums’ participation in the implementation debate. Museum associations and many individual museums voiced support for the legislation implementing the UNESCO Convention. Certain museums, however, joined the anti-UNESCO camp.

The two museum associations, American Association of Museums (AAM) and Association of Art Museum Directors (AAMD), were aware of the price that the implementation of the UNESCO Convention would entail: restricting museums’ acquisition of antiquities and limiting the American public’s enjoyment of such objects.<sup>220</sup> Yet they also believed that museums’ concerns transcended their institutional self-interest and even the interest of the American public. As custodians of man’s heritage,<sup>221</sup> museums could not condone looting of antiquities and the resulting archaeological destruction and loss of knowledge.<sup>222</sup> Furthermore, the museum associations explicitly recognized that “in their search for collections, Museums have in the past engaged in, or tolerated on the part of others, activities often detrimental to the integrity of their mission”.<sup>223</sup>

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<sup>218</sup> Hamilton, *supra* note 214, at 356, 361.

<sup>219</sup> BRODIE, DOOLE & WATSON, *supra* note 15, at 9; MEYER, *supra* note 72, at 76.

<sup>220</sup> *Hearing on H.R. 3403*, *supra* note 150, at 67.

<sup>221</sup> Joint Professional Policy on Museum Acquisitions 1973, reprinted in *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 181-182; ART LAW, *supra* note 143, at 563-564.

<sup>222</sup> *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 182; *Hearing on H.R. 3403*, *supra* note 150, at 67.

<sup>223</sup> *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 181.

On those grounds, AAM voiced support for the UNESCO Convention and the implementing legislation<sup>224</sup> and protested legislative changes that “may lessen the United States participation in the goals of the UNESCO convention and in our implementation of the convention.”<sup>225</sup> AAMD, in expressing its support, noted the cross-pressures on museums: “We have been particularly anxious to see that the legitimate needs of the American people and their educational and cultural exposure to the art of the world be satisfied, but without continuation of the indefensible and growing destruction caused by robbery and the pillage of cultural property ... of other countries.”<sup>226</sup> Striking a balance between the competing considerations, AAMD chose to give “strong[] support[] [to] the objectives of the Convention, the adherence of the United States to the Convention and the enactment of the proposed legislation.”<sup>227</sup> AAMD also criticized the attacks on the implementing legislation from the dealers and collectors, maintaining that the legislation “is clearly right and desirable, even mandatory for the preservation of the world’s cultural heritage ... a matter of honor and integrity.”<sup>228</sup> As I discuss below, AAMD’s view has shifted dramatically in recent years. From supporter of antiquities regulation, the Association has become one of its vocal critics.

Individual museums also took part in the implementation debate and expressed a variety of views. Museums of archaeology, staffed by archaeologists and dedicated to archaeological knowledge, came out in favor of the implementing legislation.<sup>229</sup> Harvard’s Peabody Museum of

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<sup>224</sup> *Id.*, at 179-183.

<sup>225</sup> *Hearings on H.R. 5643*, *supra* note 141, at 52.

<sup>226</sup> *Id.*, at 25.

<sup>227</sup> *Written Comments on H.R. 14171*, *supra* note 145, at 27. See also Resolution of the Association of Art Museum Directors on Acquisitions Policy, adopted January 23, 1973, reprinted in MEYER, *supra* note 72, at 267-268; ART LAW, *supra* note 143, at 567-568.

<sup>228</sup> *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 53.

<sup>229</sup> Support also came from museums of natural history, like the Field Museum of Natural History in Chicago. *Id.*, at 297-298.

Archaeology and Ethnology was particularly active in the debate, arguing that “the majority of illegally exported antiquities eventually end up in the United States”; and that the “physical destruction by looters of archaeological sites of incalculable scientific value is the end result of this illegal traffic”. The Museum urged the passage of the legislation as a step toward halting the devastating cultural loss.<sup>230</sup> Archaeology museums were joined in supporting the legislation by museums with little stake in the antiquities debate, such as the Smithsonian Institution.<sup>231</sup>

By contrast, the major art museums were less supportive of the legislation. Art museums did not endorse looting and the loss of knowledge that it caused. However, since they viewed antiquities as *art* objects, art museums were not as sensitive as archaeology museums to the destruction of archaeological context. They considered antiquities without context to be valuable and worth bringing into the public domain.<sup>232</sup> The major art museums thus chose to lend only qualified support to the UNESCO Convention and its implementation. Apparently, the mounting evidence on the plunder of antiquities and the involvement of American museums with looted material served as a moderating influence on art museums’ preference for unregulated trade. Given the media scandals involving museums and the growing criticism of their conduct, art museums could not afford to be seen as pursuing uninhibited expansion of their collections, released from any ethical constraints.

Most important of all was the Metropolitan Museum of Art, which held an ambivalent view. The Met expressed “full support for the objectives of [the] legislation” and “urge[d] its

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<sup>230</sup> *Written Comments on H.R. 14171*, *supra* note 145, at 64-65.

<sup>231</sup> *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 297-299; *Hearings on H.R. 5643*, *supra* note 141, at 134-135.

<sup>232</sup> *Hearing on H.R. 3403*, *supra* note 150, at 65-66; CUNO, *supra* note 212, at 9; Brodie, *supra* note 41, at 10.

enactment in slightly modified form.”<sup>233</sup> Yet the Met’s suggested modifications were not, in fact, slight. As a major museum acquiring antiquities on a regular basis, the Met had particularly strong anti-regulation incentives, which were manifested in its proposals. The Museum proposed that bilateral agreements with source countries would take the form of treaties requiring Senate ratification. This, of course, would have made the establishment of import controls infinitely more difficult.<sup>234</sup> The Met also proposed that, notwithstanding import restrictions, objects could be imported if shown to have left the country of origin at least ten years before entering the United States.<sup>235</sup> The State Department criticized the proposal as creating “a serious loophole for the flow of illicit traffic to the United States”<sup>236</sup> by circumventing import restrictions. The Met also shared the dealers’ criticism of the McClain decision and asked that the implementing legislation overturn that decision.<sup>237</sup> The Minneapolis Institute of Arts, similar to the Met, expressed an ambivalent position, supporting the passage of the legislation while sounding alarm about “throwing out the baby with the bath water and overzealous sanctions”, that might “disrupt the legal and important flow of objects from nation to nation” and “act to our own detriment.”<sup>238</sup>

Certain major art museums, such as the Brooklyn Museum,<sup>239</sup> voiced *opposition* to the legislation. The most vehement opposition, however, came from small, young art museums especially outside the Northeast. Those museums were striving to develop their collections and

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<sup>233</sup> *Written Comments on H.R. 14171*, *supra* note 145, at 50.

<sup>234</sup> *Id.*, at 51. Later on the Met revised its proposal, suggesting that a majority of either the Senate or the House would be able to reject agreements within 60 days or they would go into effect automatically. *Hearings on H.R. 5643*, *supra* note 141, at 7.

<sup>235</sup> *Hearings on H.R. 5643*, *supra* note 141, at 7. The original proposal was to allow import five years after the object had left its country of origin. *Written Comments on H.R. 14171*, *supra* note 145, at 51.

<sup>236</sup> *Hearings on H.R. 5643*, *supra* note 141, at 19.

<sup>237</sup> *Id.*, at 4-5, 15-16.

<sup>238</sup> *Hearing on H.R. 3403*, *supra* note 150, at 68-69; *Hearings on H.R. 5643*, *supra* note 141, at 119.

<sup>239</sup> *Hearings on H.R. 5643*, *supra* note 141, at 94.

establish themselves and considered international regulation a threat to their realization of those goals. They therefore shared the anti-regulation preference of the dealers. In their letters to Congress, young museums asserted that the implementing legislation “could deprive us from experiencing the cultural richness of ancient and primitive art of other cultures.” They supported maintaining “[t]he open door policy pursued by the United States Government [which] has had the long range effect of enriching our museums with the culture created throughout the world.”<sup>240</sup> They also claimed that antiquities were better off preserved in American museums than “rotting away in tropical jungles or lying unused, unseen and neglected in some basements and warehouses of different countries.”<sup>241</sup> In another line of argument, small art museums found the legislation discriminating in favor of established museums:

[The legislation] “appears to be prejudicial to those regions served by smaller museums with still developing collections of art and to favor larger, older institutions in the larger, older metropolitan areas of the Northeast, whose collections are already definitive and encyclopedic.”<sup>242</sup>

As noted above, the dealers tried to bolster their position by emphasizing the contribution of the antiquities trade to museum collections. A prominent dealer observed that

“Some U.S. museums have seen fit to support one-sided American import restrictions. Closer examination of their ranks discloses that these museums consist overwhelmingly of older institutions which have long been gorged with more material than they can hope to display. These museums are in a very different position from museums in newer, growing areas such as Texas and California, not

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<sup>240</sup> *Id.*, at 93-94 (The Bowers Museum, Santa Ana, CA). See also *Id.*, at 131. Similar to the dealers, young art museums maintained that the legislation gave too much power to the State Department “whose interest in art and humanistic-educational values” is questionable and who would use its powers to bar import of art for foreign policy reasons. *Id.*, at 100, 132; *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 296. Similar to the dealers, these museums also argued that US unilateral action would divert the flow of art to Europe, “enriching [European] museums at the expense of ours.” *Hearings on H.R. 5643*, *supra* note 141, at 100.

<sup>241</sup> *Hearings on H.R. 5643*, *supra* note 141, at 131.

<sup>242</sup> *Id.*, at 100; *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 175.

to mention the many developing art centers in smaller cities across the entire country.”<sup>243</sup>

In summary, the variety of positions taken by museums reflected the conflicting pressures they came under. Archaeology museums’ top priority was to curb archaeological looting; accordingly, they supported the legislation. Art museums place less emphasis on archaeological knowledge and context,<sup>244</sup> hence their pro-regulation incentives were generally weaker than those of archaeology museums. Within the art museums community, however, established art museums had stronger incentives to support regulation than young art museums. Already possessing rich collections, established museums were less hungry for antiquities than young museums; they were also more likely than young museums to come under public scrutiny and criticism. Young art museums were therefore more strongly opposed to the implementing legislation than the large, established museums.

## 5. Congress

As explained above, the US government came under cross-pressures with respect to the international regulation of antiquities. It attempted to strike a balance between its concern about looting on the one hand and, on the other hand, the interests of dealers, museums, collectors and the art-enjoying public. These conflicting incentives were best exemplified by the distinct positions taken by the House and the Senate. The House was sympathetic to the archaeologists’ view and supported the legislation out of concern about the negative externalities of the trade borne by foreign countries. The Senate, by contrast, privileged the interests of antiquities

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<sup>243</sup> *Hearing on H.R. 5643 and S. 2261, supra* note 115, at 51. The dealers presented to Congress a list of museum officials critical of the legislation. *Hearing on H.R. 3403, supra* note 150, at 42-43.

<sup>244</sup> *Hearing on H.R. 3403, supra* note 150, at 65-66.

consumers; it was therefore highly skeptical of the UNESCO Convention and its implementation.

The most ardent supporter of the legislation was Congressman Abner Mikva (D-IL).<sup>245</sup> Mikva rejected the arguments against the legislation, particularly the argument concerning diversion of antiquities to other market countries as a result of unilateral US action:

“What [the diversion argument] says is that since other nations and other people are going to be immoral, we have to keep up with the other immorals in order to preserve our role in the world. Clearly, the United States is the major art importing nation in the world, and if we do not exercise this kind of moral leadership, who will? If we do not create an example for other countries to implement this convention, who will implement it? If we don’t engage in those preliminary actions to put us on the side of the convention which we have already ratified, how can we expect other countries to do it? Clearly, we cannot eliminate pillage or prevent illicit traffic in antiquities alone. Closing the American art market, however, to illegal trade should create a significant deterrent and take a meaningful step toward real international cooperative effort. ... [W]hat we are talking about here is art and objects that are illegally taken from the country of origin and it seems to me that as leader of the civilized world, as a country that proclaims its morality, we ought to do whatever is necessary to help those countries that want to help themselves.”<sup>246</sup>

The report of the House Ways and Means Committee reflected a similar morally-inspired commitment to lead the efforts for the protection of archaeology. After summarizing the arguments made by the dealers and collectors, the report stated that the Committee was persuaded “by the views expressed by the other segments of the art community and the Administration that international cooperation to combat pillage and illegal trade in cultural property requires that the United States, as the major art-importing nation in the world, exercise

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<sup>245</sup> Congressman Mikva sponsored the House version of the implementing legislation.

<sup>246</sup> *Hearing on H.R. 5643 and S. 2261, supra* note 115, at 21.

moral leadership and create an example through implementation of the Convention.”<sup>247</sup> The report urged passage of the legislation which, it argued, established “an appropriate and satisfactory balance between implementation of the legitimate purpose of the Convention to assist countries in protecting their cultural patrimony on the one hand, and legitimate concern that restrictions might be so broad and comprehensive in scope as to prevent importation into the United States of all or most archaeological” material.<sup>248</sup>

The Senate, by contrast, was much more attentive to the concerns of the dealers than those of archaeologists and source countries. Senators Moynihan and Ribicoff in particular considered the implementing legislation to be a grave threat to the legitimate interests of the United States as an art-importing country. Moynihan rejected terms like pillage and despoliation as “language of guilt” and “self-abasement”, arguing that “[n]othing has been more striking than the respect which Western countries have shown for the archaeological and ethnological artifacts of other countries.”<sup>249</sup> Moynihan also considered the UNESCO Convention a “self-denying ordinance”<sup>250</sup> and praised the dealers as “respected and honored members of a profession which has done” a lot “to conserve and preserve the art objects of this world ... .”<sup>251</sup> Unlike Congressman Mikva, who rejected the dealers’ argument against unilateral US action, Senator Moynihan embraced that argument: “We are not going to gain the respect of anybody by being the only ones to do this. ... [U]ntil we can persuade the other importing countries to act in this matter, we ought not to do so unilaterally.”<sup>252</sup> Senator Ribicoff endorsed the dealers’ argument that source countries did little

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<sup>247</sup> *Implementation of Convention on Cultural Property*, *supra* note 196, at 4.

<sup>248</sup> *Id.*, at 19.

<sup>249</sup> *Hearing on H.R. 5643 and S. 2261*, *supra* note 115, at 33.

<sup>250</sup> *Id.*, at 34.

<sup>251</sup> *Id.*, at 45-46.

<sup>252</sup> *Id.*, at 34. According to Moynihan’s count, the vast majority of countries who had ratified the Convention at the time were dictatorships. *Id.*, at 33.



to save their own antiquities and that those antiquities would be better preserved in American museums.<sup>253</sup> Yet Ribicoff saw the legislation through a broader perspective. His hostility to the UNESCO Convention had much to do with his apprehension and anger about the diminishing influence of the United States in international organizations. Ribicoff argued that international organizations had become politicized and “invariably against the basic interests of the United States”, which had found itself completely isolated on issue after issue. Furthermore, he considered UNESCO to be “one of the worst of all of the international organizations in its attitude toward U.S. policy”, a “moribund” organization which “is invariably against the United States on everything, and the US influence gets weaker and weaker every year.”<sup>254</sup>

## 6. State Department

As explained above, the State Department held the view that the United States must make action for the protection of archaeology abroad, while at the same time setting boundaries to such action out of concern for the legitimate interests of the US art market. The State Department was the engine driving the efforts for US ratification and implementation of the UNESCO Convention, drafting the implementing legislation in 1973 and later revising it in consultation with the relevant stakeholders.<sup>255</sup> Mark Feldman, the legislation’s architect, took part in the Congressional implementation debate by explaining the legislation’s rationale and implications and urging its passage.

Feldman made various points in support of the legislation. He emphasized that the UNESCO Convention was much more modest than originally intended. In particular, the

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<sup>253</sup> *Id.*, at 71-72, 145-146.

<sup>254</sup> *Id.*, at 36-37.

<sup>255</sup> DuBoff et al., *supra* note 115, at 129.

Convention was not retroactive and did not involve comprehensive import controls.<sup>256</sup> He also pointed out that the implementing legislation included numerous safeguards to ensure that import controls would not be applied indiscriminately and that the burden on the United States would not be onerous.<sup>257</sup> The legislation therefore would not result in a total blockage of the import of art into the country.<sup>258</sup> Feldman also emphasized that the “original legislation has been refined and improved in extensive consultations with all interested elements of the art, museum, and scientific community” and reflected a consensus among the relevant stakeholders.<sup>259</sup> The legislation would put the force of Government authority behind this growing consensus and thereby push forward those institutions not yet prepared to make that step.<sup>260</sup>

Feldman made a principled case in support of the legislation. He argued that the US market was a major consumer of looted antiquities and thereby provided incentives for clandestine excavation and despoliation. Consequently, the United States had a responsibility to curb archaeological plunder; “[T]here is a moral obligation to act.”<sup>261</sup> To the argument against going it alone, Feldman responded:

“We feel that the United States should meet its own responsibilities in this area. It is not the first time the United States has set the pattern for international conduct ... We are the principal art-importing country and we believe there is a US interest in the preservation of the record of ancient civilizations, and that we should not continue to provide an incentive for the despoliation of ... archaeological sites in foreign countries.”<sup>262</sup>

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<sup>256</sup> *Hearing on H.R. 5643 and S. 2261, supra* note 115, at 17-18.

<sup>257</sup> *Id.*, at 18; *Hearing on H.R. 3403, supra* note 150, at 5.

<sup>258</sup> *Hearing on H.R. 5643 and S. 2261, supra* note 115, at 27.

<sup>259</sup> *Id.*, at 17.

<sup>260</sup> *Hearing on H.R. 3403, supra* note 150, at 4, 7.

<sup>261</sup> *Hearing on H.R. 5643 and S. 2261, supra* note 115, at 19.

<sup>262</sup> *Hearing on H.R. 3403, supra* note 150, at 6.

After multiple revisions and delays, primarily due to the Senate's failure to take action,<sup>263</sup> the Convention on Cultural Property Implementation Act (CPIA or the Act) was ultimately signed into law in January 1983. The Act allows establishment of import restrictions through bilateral agreements or on an emergency basis without agreement. As explained above, the dealers effectively held veto power over the legislation through Senator Moynihan, and CPIA ultimately met most of their concerns. The dealers' three major priorities were:

1. Involvement of experts in the implementation of the legislation.
2. Diminution of the State Department role.
3. Making US cooperation part of a concerted international effort.

CPIA granted all three:

1. Authority to examine the requests of source countries and to recommend the establishment of import controls was given to the Cultural Property Advisory Committee (CPAC). The eleven member Committee consists of two members representing museums; three members representing the archaeological community; three members representing the dealers; and three members representing the general public.<sup>264</sup>
2. Most decision authorities that CPIA confers upon the President were delegated to the United States Information Agency (USIA),<sup>265</sup> rather than the State Department. The dealers' victory in minimizing the State Department's involvement was temporary, however. With the dissolution of USIA in 1999, the State Department assumed responsibility for implementing the Act.

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<sup>263</sup> Id., at 4; Hearings on Miscellaneous Tariff Bills – 1982 before the Subcommittee on International Trade of the Committee of Finance, United States Senate, 97<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 557 (July 21 and 22, 1982).

<sup>264</sup> Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, § 306, 96 Stat. 2329 (1983), as amended by Pub. L. 100-204, 101 Stat. 1331 (1987).

<sup>265</sup> USIA was an agency working to further the dialogue between US citizens and institutions and their foreign counterparts and to promote acceptance of US policies by foreign publics. The delegation of authority under CPIA to USIA is in Executive Order 12555 of March 10, 1986.

3. CPIA requires that the establishment of import restrictions through bilateral agreements would be “in concert with similar restrictions implemented” by other art-importing countries. CPIA thereby met the dealers’ most important request to make US action conditional upon a broader international effort.<sup>266</sup>

CPIA included several other compromises favorable to the dealers. The bilateral agreements with source countries were to have a limited duration of five years which could be extended by additional five year periods.<sup>267</sup> The Act requires the United States, when granting a country’s request for import restrictions, to endeavor to obtain that country’s reciprocal commitment to allow legitimate exchange of antiquities.<sup>268</sup> The Act allows the importation of antiquities otherwise banned by import restrictions upon provision of satisfactory evidence that the antiquities have left the exporting country at least ten years before the date of import.<sup>269</sup> The dealers failed, however, to achieve one important goal: overturn of the McClain decision. Overturning the decision was indeed a part of the compromise that led to the passage of CPIA, but had to be achieved through separate legislation. Senator Moynihan therefore introduced legislation to that effect, but it ultimately failed to pass.<sup>270</sup>

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<sup>266</sup> Convention on Cultural Property Implementation Act, *supra* note 264, § 303(a)(1)(C); § 303(c)(1); § 303(d).

<sup>267</sup> Convention on Cultural Property Implementation Act, *supra* note 264, § 303(b); § 303(e).

<sup>268</sup> Convention on Cultural Property Implementation Act, *supra* note 264, § 303(a)(4). See *Hearings on H.R. 5643*, *supra* note 141, at 37-38.

<sup>269</sup> Convention on Cultural Property Implementation Act, *supra* note 264, § 307(b)(2)(A). The Act requires that the person for whom the material is imported would not have acquired an interest in that material more than a year before the date of entry.

<sup>270</sup> Pearlstein, *supra* note 188, at 19-20; *Hearing on S. 605 before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate*, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess., 14-15 (May 22, 1985).

## V. Antiquities Regulation: The Contemporary Debate (1983-2008)

El Salvador was the first country to request the imposition of import controls under CPIA. El Salvador's request focused on an important archaeological site known as Cara Sucia and its immediate area on the Southwestern coast, bordering Guatemala.<sup>271</sup> In its request, El Salvador reported that "more than 5,000 pits had been dug, damaging or destroying burials, remains of structures and other archaeological features which could have contributed to the knowledge of this region's prehistory." El Salvador further maintained that the United States had become the major market for its antiquities and that the illicit antiquities trade had reached a degree of intensity and sophistication that was beyond the Salvadoran government's ability to control.<sup>272</sup> El Salvador's request constituted an easy first case: the destruction was evident, the area was definable, and the low market value of Salvadoran antiquities did not generate significant opposition from the trade.<sup>273</sup> Acting upon CPAC's recommendation, USIA established emergency import restrictions on artifacts from El Salvador's Cara Sucia region in September 1987.<sup>274</sup> In 1995 the United States and El Salvador signed a bilateral agreement, imposing import restrictions on all of El Salvador's pre-Hispanic heritage. To date, the United States has signed bilateral agreements for the imposition of import restrictions with twelve countries: El Salvador, Bolivia, Peru, Guatemala, Mali, Canada, Cyprus, Cambodia, Nicaragua, Italy, Honduras and Colombia.<sup>275</sup> These agreements are all in force today, except for the Canadian agreement which

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<sup>271</sup> Coggins, *supra* note 109, at 58.

<sup>272</sup> Ann Guthrie Hingston, *U.S. Implementation of the UNESCO Cultural Property Convention, in THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* 129, 135, 137 (Phyllis Mauch Messenger ed., 2<sup>nd</sup> ed., 1999).

<sup>273</sup> Coggins, *supra* note 109, at 58; Hingston, *supra* note 272, at 138.

<sup>274</sup> Hingston, *supra* note 272, at 139-143.

<sup>275</sup> For a list of the agreements see <http://culturalheritage.state.gov/chart.html> (last accessed October 16, 2008). Several of the agreements were preceded by emergency restrictions.

expired in 2002. A highly controversial request for a bilateral agreement with China is still pending at the time of writing.

Litigation has provided another avenue for combating looting and protecting archaeology. Indeed, the number of court cases concerning antiquities has been rather small; certain cases – especially civil claims for the recovery of stolen antiquities – ended in out-of-court settlements. Nevertheless, the impact of litigation on the US market has been even more profound than that of import controls established under CPIA. One case in particular has attracted ire or praise, depending on one’s point of view: *United States v. Schultz*.<sup>276</sup> Frederick Schultz, a prominent art dealer, was indicted in 2001 for conspiring to import, deal in, and possess antiquities stolen from Egypt in violation of the Egyptian law vesting ownership of antiquities in the Egyptian nation.<sup>277</sup> The indictment charged that Schultz and his co-conspirator smuggled several objects out of Egypt, most notably the head of the Eighteenth Dynasty Pharaoh Amenhotep III which was disguised as a souvenir replica. To give the antiquities a legitimate cover, Schultz and the co-conspirator assigned the antiquities to an “old collection”, which they fabricated. The case required the court to address the controversial *McClain* doctrine, and both the lower court and the appellate court chose to follow *McClain* and convict Schultz. For supporters of the *Schultz* decision, this case sent a warning signal to those who deal in and purchase antiquities: a foreign national ownership law is enforceable in US courts; trading in looted antiquities may therefore have painful consequences.<sup>278</sup> For its critics, the *Schultz* decision nullified Congress’ intent in enacting CPIA and had deeply troubling implications for the legitimate trade in antiquities.<sup>279</sup> The affirmation of the *McClain* doctrine in *Schultz* has “cast a cloud over title to every cultural

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<sup>276</sup> 333 F.3d 393.

<sup>277</sup> Gerstenblith, *supra* note 188, at 70.

<sup>278</sup> *Id.*, at 71-74.

<sup>279</sup> Pearlstein, *supra* note 188, at 11.

object otherwise lawfully imported into the United States, including objects imported ... in compliance with the Implementation Act.”<sup>280</sup>

How have the various domestic constituencies viewed the American antiquities policy since the 1983 enactment of CPIA? The contemporary debate over antiquities regulation exhibits significant continuity with the earlier debate over the implementation of the UNESCO Convention.

According to the dealers, CPIA could have done much good if the US government had implemented the Act the way Congress intended – as a tailored response to specific situations of archaeological crisis. The dealers believe that the long battle over CPIA resulted in a statutory process that constitutes a fair compromise of the various interests involved; the US government, however, chose to breach the fundamental principles of the legislation. In the dealers’ view, the restraints built into CPIA broke down, resulting in excessive import restrictions to the detriment of the US art market.<sup>281</sup> This has not always been the case. The dealers consider the statutory process to have worked reasonably well over the first fifteen years of CPIA’s existence. The initial requests submitted by foreign countries were precise, specific, and narrow; the bilateral agreements that followed were essentially non-controversial.<sup>282</sup> Things changed dramatically in the late 1990s, when the US government, according to the dealers, undermined the Act’s delicate balance by signing several over-restrictive agreements heavily tilted in favor of source countries. First, these agreements have been overly broad in scope. According to the dealers’ interpretation of CPIA, the United States reserves the judgment as to the scope of antiquities to be covered and

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<sup>280</sup> *Id.*, at 22.

<sup>281</sup> Interview with William Pearlstein, attorney at Golenbock, Eiseman, Assor, Bell & Peskoe, in New York, NY (May 2008); Interview with James Fitzpatrick, *supra* note 182; Fitzpatrick, *supra* note 202.

<sup>282</sup> Interview with James Fitzpatrick, *supra* note 182; Fitzpatrick, *supra* note 202, at 53.

should apply import restrictions only to significant objects.<sup>283</sup> In practice, however, the United States accepted the sweeping requests of foreign countries for across-the-board protection of their entire cultural heritage. The agreement with Peru drew particularly harsh criticism, as it applied to “[o]ver one hundred categories of archaeological material covering a 13,000 year period.”<sup>284</sup> Furthermore, the dealers maintain that the United States granted requests for import restrictions even when the evidence of looting was limited and shaky; and that the coverage of the restrictions has been far broader than what was necessary to deter looting.<sup>285</sup> In the words of a lawyer representing dealers, the import restrictions are an “all-you-can-eat-buffet.”<sup>286</sup>

As noted above, CPIA made the imposition of US import restrictions conditional on a joint international effort. In practice, the dealers argue, the US government has all but ignored this requirement. The United States signed bilateral agreements and established import restrictions notwithstanding the fact that no other market country applied similar restrictions.<sup>287</sup> The dealers also maintain that recent bilateral agreements realized their long-held fear: American cooperation on antiquities has become a means for improving relations with foreign countries and eliciting their cooperation on matters of greater concern to the US government.<sup>288</sup>

In short, the dealers maintain that CPIA implementation by the State Department has completely disregarded – in fact, undermined – the Congressional intent and the explicit

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<sup>283</sup> Interview with William Pearlstein, *supra* note 281; Interview with James Fitzpatrick, *supra* note 182.

<sup>284</sup> Fitzpatrick, *supra* note 202, at 69.

<sup>285</sup> Fitzpatrick, *supra* note 202; Interview with James Fitzpatrick, *supra* note 182.

<sup>286</sup> Interview with William Pearlstein, *supra* note 281.

<sup>287</sup> Interview with James Fitzpatrick, *supra* note 182; Fitzpatrick, *supra* note 202, at 74-75.

<sup>288</sup> Specifically, the dealers point to the bilateral agreement with Canada as a means to placate the Canadian anger over the Helms-Burton Act. They also argue that the State Department’s expansion of the agreement with Cyprus to include coins, contrary to CPAC’s expert opinion, had to do with Cyprus’ help in the War on Terror. Interview with James Fitzpatrick, *supra* note 182; Fitzpatrick, *supra* note 202, at 76-77.



language of the Act, with terrible consequences for the US art market. Unfortunately for them, the dealers have not enjoyed the same influence over the State Department that they had over the Senate during the implementation debate. Furthermore, the dealers feel that the public climate has turned against the antiquities trade and in favor of the position of source countries and the archaeologists. They attribute this change in large part to the advocacy and educational efforts of the archaeological community<sup>289</sup> as well as to general changes in public morals. Today, people are more inclined to buy into the perception of developing countries as defenseless victims subject to ruthless plunder, which is fueled by “rich white guys” – American collectors.<sup>290</sup> Dealers consider this perception to be false, and yet its popular appeal has put them on the defensive. An additional cause of the anti-trade shift has been scandals involving museums. Unscrupulous museum conduct served as an important motivation for the US efforts against looting starting in the late 1960s and has continued to raise concerns in recent years. Major scandals, like the Getty Museum’s purchase of looted material,<sup>291</sup> have tarnished the reputation of the entire market and have fostered an anti-trade, pro-source-countries mindset.

How do the archaeologists view the implementation of CPIA? Motivated by their concern about plunder of antiquities, the archaeologists were the primary proponents of CPIA and advocated strict regulation of archaeological material. Today, the archaeologists’ position is shared by a broader cultural heritage community which also includes such organizations as Lawyers’ Committee for Cultural Heritage Preservation and SAFE [Saving Antiquities for

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<sup>289</sup> Interview with James Fitzpatrick, *supra* note 182.

<sup>290</sup> Interview with William Pearlstein, *supra* note 281.

<sup>291</sup> In 2007 the Getty Museum agreed to return to Italy forty antiquities which, according to Italy, were looted. *Getty Agrees to Return 40 Antiquities to Italy*, INT’L HERALD TRIBUNE, August 1, 2007. Brodie, *supra* note 41, at 13 lists returns by US art museums of stolen or illegally exported archaeological objects, 1974-2002.

Everyone].<sup>292</sup> This position has remained unchanged since the implementation debate: demand from dealers, museums, and collectors fuels the looting of archaeology; tight regulation by market countries is essential for curbing the plunder.

The dealers believe that the system established by CPIA has collapsed and that bilateral agreements have been signed in disregard of the strict requirements of the Act. By contrast, leading members of the cultural heritage community – Patty Gerstenblith and Nancy Wilkie<sup>293</sup> – consider CPIA to have worked reasonably well. If they have any complaint, it is that the process leading to the establishment of import restrictions is too long and cumbersome and imposes too heavy a burden on the requesting countries. As a result, the United States has signed agreements with only a dozen countries at the time of writing. Gerstenblith and Wilkie would have liked to ease the process, ideally by making US action unconditioned upon individual requests of source countries and the signing of bilateral agreements. More realistically, they would have liked the bilateral agreements to have indefinite duration rather than the current practice – five year duration which may be extended by additional five year periods. In their view, the limited duration of the agreements not only serves as an unnecessary obstacle for cooperation, but also defeats its purpose. If looters believe that the agreement will expire, they still have an incentive for looting. Similarly, dealers still have an incentive to buy looted material and storage it until after the expiration of the agreement and the pursuant import restrictions.<sup>294</sup> Furthermore, Gerstenblith believes that the dealers’ complaints are unwarranted. For example, she points out

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<sup>292</sup> According to SAFE’s website, it is a coalition of scholars, professionals, educators, students and others dedicated to preserving cultural heritage worldwide.

<http://www.savingantiquities.org/aboutuswhoweare.php> (last accessed October 16, 2008).

<sup>293</sup> Patty Gerstenblith is professor of law and founding president of the Lawyers’ Committee for Cultural Heritage Preservation. Nancy Wilkie is professor of archaeology and former president of the Archaeological Institute of America.

<sup>294</sup> Telephone interview with Patty Gerstenblith (May 2008); Telephone interview with Nancy Wilkie (May 2008).

that CPIA does allow unilateral US action as an exception to the requirement of joint international action.<sup>295</sup>

The archaeologists' and dealers' current positions are consistent with the views they expressed during the implementation debate in Congress. By contrast, the major art museums have moved since that debate further into the anti-regulation camp. Their qualified support for the implementation of the UNESCO Convention turned into vocal criticism of antiquities regulation. In fact, the major art museums and the Association of Art Museum Directors have taken on the role – previously played by the dealers – as leaders of the battle against extensive antiquities regulation.<sup>296</sup> This shift in the museum community's views likely reflects disappointment with the actual implementation of CPIA which has not conformed to the museums' original understanding. Whereas the museums envisioned modest, narrowly-defined import restrictions, the extent of restrictions in practice far exceeded their expectations. Another possible cause is that the temptation facing museums has increased in recent years, as museums

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<sup>295</sup> Convention on Cultural Property Implementation Act, *supra* note 264, § 303(c)(2).

Gerstenblith also rejects the argument that other market countries have not implemented the UNESCO Convention, arguing that those countries, unlike the United States, chose to implement the Convention without need for bilateral agreements with source countries.

<sup>296</sup> The major art museums and AAMD take an active part in the contemporary antiquities debate. By contrast, the American Association of Museums represents a far larger and more diverse group of museums, the majority of which do not acquire antiquities. AAM therefore is not a major actor in the antiquities debate. AAM, however, submitted an *Amici Curiae* brief in the *Steinhardt* case (United States v. An Antique Platter of Gold, 184 F.3d 131 [2d. Cir 1999]). In its submission, AAM denounced foreign ownership laws and US enforcement of such laws. According to AAM, such laws are “antithetical to fundamental principles of US law and public policy” and directly challenge the ‘common cultural heritage’ philosophy upon which our museums and society are founded (American Association of Museums, *Brief of Amici Curiae, American Association of Museums, Et Al. in Support of the Appeal of Claimant Michael H. Steinhardt* (1998), reprinted in 9 INT’L J. CULTURAL PROP. 76, 77, 80 (2000). AAM further claimed that US enforcement of such laws goes against CPIA, since that Act embodies “the policy determination ... that the United States would *not* give source nations a ‘blank check’ by automatically enforcing their cultural property laws.” *Id.*, at 84.

grew wealthier and as the market expanded to include new supplying countries, such as China. Consequently, museums' incentives to resist restrictions on acquisition have grown.

What arguments do art museums make against strict regulation of the antiquities trade? James Cuno, the director of the Art Institute of Chicago, is one of the prominent voices in the museum community. Some of the arguments Cuno makes are practical. He maintains, for example, that an absolute prohibition on acquisition of unprovenanced objects is nonsensical. Since the looting has already occurred and the knowledge that may have been gained from the antiquity's context has already been lost, it would be better to bring the antiquity into the public domain where it will be preserved and made available to everyone for study and appreciation.<sup>297</sup> Cuno is also critical of CPIA implementation, arguing that the US government has effectively given a blank check to source countries contrary to the explicit intention of Congress, and that political considerations influence US decisions on import restrictions.<sup>298</sup> The Association of Art Museum Directors is similarly critical of the US practice. The Association's main grievance with respect to CPIA's implementation is the disregard of the Act's requirement of joint international effort. According to the Association's Director of Government Affairs, unilateral US action is not only inconsistent with the Act, but also does little to curb looting. It merely reroutes the trade to other market countries and "deprive[s] the US public of enjoying any legally imported antiquities."<sup>299</sup>

Through principled arguments and practical suggestions, the US museum community advocates cultural exchange and expansion of the legal antiquities trade. Cuno sharply criticizes foreign laws that establish national ownership of antiquities, arguing that such laws serve

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<sup>297</sup> CUNO, *supra* note 212, at 7-8; Telephone interview with James Cuno, Director of the Art Institute of Chicago (May 2008).

<sup>298</sup> Interview with James Cuno, *supra* note 297.

<sup>299</sup> Telephone interview with Anita Difanis, AAMD Director of Government Affairs (May 2008).

political and economic purposes, rather than the purpose of cultural preservation.<sup>300</sup> “Nationalist retentionist cultural property laws serve the interests of one particular modern nation at the expense of the rest of the world. ... Antiquities are the cultural property of all humankind – of *people*, not *peoples* – evidence of the world’s ancient past and not that of a particular modern nation.”<sup>301</sup> Cuno also criticizes the UNESCO Convention for affirming the principle of national retention of antiquities and failing, in four decades of existence, to protect archaeological sites and discourage looting.<sup>302</sup> He believes that “[w]e should all work together to counter the nationalist basis of national laws and international conventions and agreements and promote a principle of shared stewardship of our common heritage.”<sup>303</sup> Practically speaking, Cuno calls for long term loans of antiquities and the reinstatement of the practice of *partage* (an arrangement practiced in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries for the sharing of archaeological finds between the foreign excavating team and local authorities).<sup>304</sup> AAMD would have liked source countries to relax restrictions and issue more export certificates and believes that the State Department should urge source countries to move in that direction and release more antiquities to the legal market.<sup>305</sup>

What has been the impact of antiquities regulation on the conduct of museums? In recent years, the acquisition of antiquities by museums has diminished overall. Extensive restrictions on export from source countries coupled with growing demand for objects with clean provenance

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<sup>300</sup> CUNO, *supra* note 212, at 12-13 and ch. 5; Interview with James Cuno, *supra* note 297. Governments may be interested in establishing a direct link to earlier peoples as a way to bolster the regime’s legitimacy; enhance the country’s international standing; or reap the benefits of tourism.

<sup>301</sup> CUNO, *supra* note 212, at 146.

<sup>302</sup> Interview with James Cuno, *supra* note 297.

<sup>303</sup> CUNO, *supra* note 212, at 154-155.

<sup>304</sup> *Id.*, at 14; Interview with James Cuno, *supra* note 297.

<sup>305</sup> Interview with Anita Difanis, *supra* note 299.

have driven prices up and have taken antiquities acquisition out of the financial reach of many museums.<sup>306</sup> Furthermore, acquisition today carries significant risks for museums, especially the risks of legal battles, either over civil claims for return or over criminal charges. Museums caught in unlawful possession of antiquities pay a hefty price in terms of reputation and public trust as well as loss of the acquisition funds.<sup>307</sup> The chilling effect of litigation has increased the reliance on loans and has made museums more cautious about accepting antiquities from collectors.<sup>308</sup> Archaeologists, however, still voice criticism over the conduct of American museums. In particular, they maintain that the AAM and AAMD statements on the ethics of acquisition (which guide individual museums) do not go far enough and do not entirely prohibit acquisition of looted material.<sup>309</sup>

## VI. Conclusion

The debate over international antiquities regulation has been raging in the United States for forty years but has seen little progress. The protagonists may have changed – art museums rather than dealers are today the main opponents of regulation – but the opposing camps still hold highly

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<sup>306</sup> *Id.*; CUNO, *supra* note 212, at 5; Press Release, Association of Art Museum Directors, Survey Shows Museum Antiquities Purchases Are Less Than 10% of Global Trade (February 7, 2006), available at

[http://www.aamd.org/newsroom/documents/AAMDAntiquitiesSurveyRelease\\_FINAL.pdf](http://www.aamd.org/newsroom/documents/AAMDAntiquitiesSurveyRelease_FINAL.pdf) (last accessed February 12, 2009).

<sup>307</sup> James Cuno, *Museums, Antiquities, Cultural Property, and the US Legal Framework for Making Acquisitions*, in WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 143, 151 (Kate Fitz Gibbon ed., 2005); Interview with James Cuno, *supra* note 297; CUNO, *supra* note 212, at 4-5; Interview with Anita Difanis, *supra* note 299.

<sup>308</sup> Interview with Anita Difanis, *supra* note 299.

<sup>309</sup> Interview with Patty Gerstenblith *supra* note 294; Brodie, *supra* note 41, at 14-16. The criticism refers to the 2004 AAMD guidelines (Report of the AAMD Task Force on the Acquisition of Archaeological Materials and Ancient Art, June 2004). In 2008 AAMD published new – and stricter – guidelines. Those guidelines, however, still afford museums discretion and do not establish an outright ban on the acquisition of unprovenanced antiquities.

divergent views even with respect to the most fundamental questions: Do antiquities belong to source countries or to mankind? Are unprovenanced objects likely looted? Is archaeological heritage best protected through strict regulation or through the release of objects to the open market? The archaeological and art communities give very different answers to these questions, and the debate between them is not much closer to resolution today than it was four decades ago.

What are the implications of the American policy on antiquities for the values-versus-interests debate? This case has clearly demonstrated that *under certain circumstances* values can matter. Governments may indeed take into account values and moral beliefs when forming their views on an international agreement. Furthermore, values may overwhelm material self-interest. A government may choose to promote values even when doing so means incurring significant costs and lowering the welfare of domestic constituencies. As this article has shown, the US government was willing to bear the economic and cultural costs of antiquities regulation for the purpose of curbing plunder abroad. It sought to advance archaeological preservation and historical knowledge at the expense of American dealers and collectors as well as the museum-going public. Yet the article has also demonstrated that choosing values over material interests is a rare occurrence. The United States decided to support and join the UNESCO Convention early on; all other market countries, however, refused for decades to impose costs on their art markets and law enforcement agencies in order to save archaeology abroad.

Why was the United States the only major market country willing to compromise its self-interest for the sake of archaeological preservation? This article has identified two factors that increased the weight of normative considerations in the eyes of US policymakers and allowed those considerations to prevail over material interests. First, public scandals played an important role in convincing policymakers that the United States should put its own house in order. These

scandals created a sense of shame and embarrassment and a feeling that something had to be done. They also mitigated the resistance of those actors that opposed the UNESCO Convention and created a public climate conducive to the Convention's ratification and implementation. Second, advocacy of civil society – the archaeological community – proved effective and essential. Building on their knowledge and experience, the archaeologists managed to convey to policymakers how catastrophic looting is for our understanding of the past. They demonstrated the gravity of the problem in concrete and tangible ways; showed how the demand of markets – in particular, the American one – fueled looting; and convinced policymakers that regulation was necessary.

The article has examined how the US government balanced values and interests with respect to the regulation of antiquities and why values ultimately trumped interests. This, I believe, is the way forward for the values-versus-interests debate. To make progress in this debate, we ought to move beyond the question of whether values or interests matter. The more fruitful avenue of inquiry would be to specify how governments balance values versus interests and to identify the conditions under which they favor one or the other.